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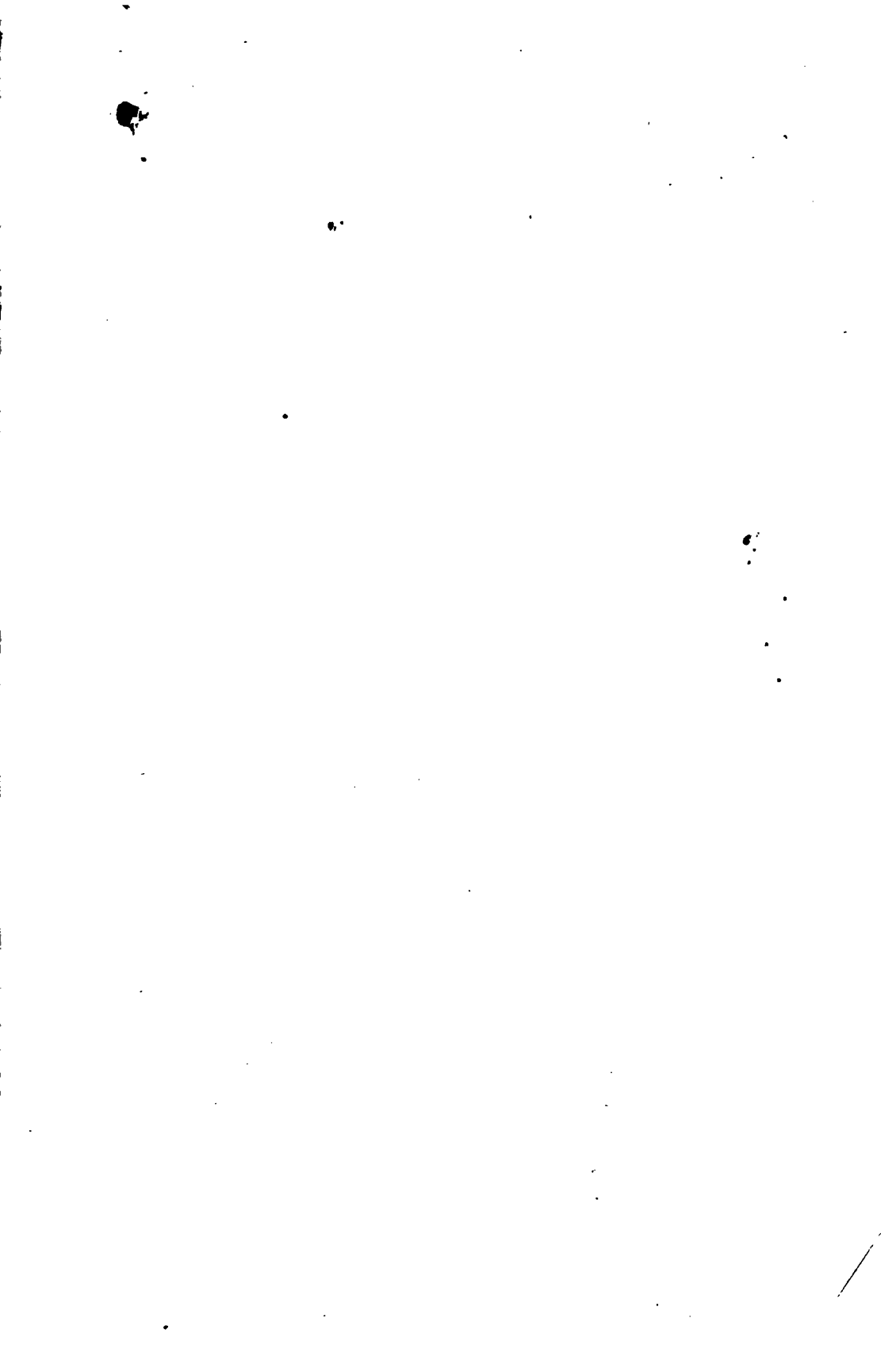
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CIVIL PROCEDURE

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IN

LOUISIANA

(FOLLOWING THE CODE OF PRACTICE)

BY

CHARLES T. WORTHAM,

Judge of the 27th Judicial District of Louisiana

VOLUME ONE

THE BRINGING OF SUITS
THE POWERS OF COURTS

PUBLISHED AND SOLD BY
THE WRITER.
NAPOLEONVILLE, LA.

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To

EDWARD N. PUGH

Of the Donaldsonville, La., Bar,

In Appreciation

Of His Love for the Law, and His

Profound Knowledge Thereof;

And Especially of the Helping Hand

He Is Ever Ready to Extend

To the Young Practitioner.

PREFACE

This work is designed to help the busy lawyer; and to give him, following the order of the Code of Practice, in concrete and collected form, the rules of civil procedure.

The Code of Practice is adopted as a text, and a discussion of each article, with kindred legislation and jurisprudence, is attempted in the shape of notes to the article.

Particular actions, not mentioned in the Code of Practice, are inserted, it is hoped, in logical arrangement, and with helpful discussion. Such are the Actions to Establish Title to Real Estate, Jactitation, Removal of Cloud on Title, Trespass, Ejectment of Tenants, Quieting Tax Titles, etc. Actions belonging to the Civil Code, and treated therein, are not treated at length in this work, but reference is given to where the rules regarding them may be found.

All articles of the Code of Practice are given in the latest amended form; and, where any articles have become inoperative or superseded by other legislation, they are not reproduced herein, but the legislation supplanting same is given instead.

The size of this work can convey no adequate idea of the work expended thereon. Every case cited, besides others not cited, has been carefully read and digested, and the writer has spared no labor to give the true rule of law in each case.

The writer modestly ventures his opinion in some cases on points which have not been settled by the jurisprudence or on which the decisions are conflicting.

A minute index to all articles and statutes printed herein, as well as to all notes and discussion, is subjoined. The aim is to enable the practitioner to find any point he seeks under the heading which first comes to his mind.

There is necessarily much elementary discussion. This is especially true under such subjects as Petition and Citation. This will be of great assistance to the beginner, and we do not believe the old practitioner ever reaches the point where he does not have to refer sometimes to elementary principles.

Brevity has been the especial aim of the writer. Each proposition is stated as tersely and as succinctly as possible, and the decisions sustaining it are collected following it.

The author hopes that what this volume lacks in bulk it will present in value and merit; and that it will realize its aim to present to the profession *multum in parvo*.

CHARLES T. WORTHAM.

NAPOLÉONVILLE, LA., February, 1916.

INTRODUCTION

The Code of Practice was adopted as Act No. 98 of 1870. See Acts 1870, p. 131. A Table of Contents, conforming to the Parts, Titles, Chapters, Sections and Sub-sections of the Code of Practice is given as part of the title of this act. In the Synopsis of Contents, which follows this Introduction, this Table of Contents is followed; but the subdivisions have been extended into more minute subdivisions, other subdivisions have been added, and an effort has been made to arrange in a more synoptical form. The writer did not feel at liberty to vary the general arrangement and plan of the Code. As an example, generally throughout the Code "Action" and "Suit" are used indiscriminately, as if they were synonymous terms; and the same use is made of the terms in the notes and index, which are the work of the writer; but, under Arts. 95 and 96, a "Suit" is an action carried before a court; while the term "Action" is made to embrace the right of action as well as the exercise of that right by pursuit of relief in court (Art. 1). Therefore, when we came to give "Suits" a place in the synopsis of contents, we felt constrained, under the definitions, to place it as a subdivision of "Actions," although no attempt whatever is made to preserve this nicety of distinction, either generally in the text of the Code or in the notes and index.

The Code of Practice prevails over the Civil Code as adopted by Act 97 of 1870, R. S. 514, and over the Revised Statutes as adopted by Act 96 of 1870. See R. S. 3990.

But it is believed any amendments of either Code or of any section of the Revised Statutes would prevail, as the latest expression, over any provision conflicting therewith, whether contained in the Revised Statutes or in either of the Codes. See Fuselier, 109 La. 551.

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CIVIL PROCEDURE IN LOUISIANA

FOLLOWING THE CODE OF PRACTICE PART I.—OF CIVIL ACTIONS

TITLE I.

Of Actions in General

Definition.

Art. 1. An action is the right given to every person to claim judicially what is due or belongs to him.

Action means also the exercise of that right, that is to say, a judicial demand founded on a contract or given by law, by which the plaintiff prays that the person against whom he proceeds be ordered to do that which he has bound himself towards him to perform.

See Introduction to this Book.

(1) Non-judicial proceedings are, of course, not suits.
Carre, 41 A. 996.

(2) If the plaintiff's petition does not contain allegations which, taken all together, set out a *right* under this definition, the petition is subject to dismissal on an exception of no cause or right of action. This will be treated under the head of Exceptions. This exception must not be confounded with an "exception of vagueness and insufficiency of allegations." Goldsmith, 122 La. 831, 834.

See notes to Art. 161.

CHAPTER 1.

OF THE GENERAL DIVISION OF ACTIONS.

Kinds.

Art. 2. Actions are divided into several kinds.

The **First Division** of actions is into personal, real, and mixed.

C. P. 96.

An action does not derive its character from the name given it, but from the allegations and the facts of the case. Ferrand, 35 A. 908.

Art. 3. A **Personal Action** is that by which a person proceeds against one who is personally bound towards him, either by a contract or by virtue of the law, in order to compel him to pay what he owes to him or to perform what he had promised.

This action is called personal, because it is attached to the person bound and follows him everywhere.

See Art. 26 et seq.

Art. 4. A **Real Action** is that which relates to claims made on immovable property, or to the immovable rights to which they are subjected.

The object of this action is the ownership or the possession of such property; and they are therefore subdivided into petitory and possessory actions.

See Art. 41 et seq.

Grant, 131 La. 865; Producers', 132 La. 691.

Art. 5. The **Petitory Action** is that by which he who has the property of a real estate, or of a right upon or growing out of it, proceeds against the person having the possession, in order to obtain the possession of the immovable property, or the enjoyment of the rights upon it to which he is entitled.

See Art. 43 et seq.; R. C. C. 2010 et seq.

Whited, 122 La. 117; Bossier's, 114 La. 710; Dreux, 12 R. 489, 501.

Art. 6. A **Possessory Action** is that by which one claims to be maintained in the possession of an immovable property, or of a right upon or growing out of it, when he has been disturbed; or to be reinstated to that possession, when he has been divested or evicted.

See Art. 46 et seq.; R. C. C. 3454-5-6.

Grant, 131 La. 866; Bossier's, 114 La. 710; Newell, 50 A. 163; Producers', 182 La. 691.

Art. 7. A **Mixed Action** is one which in its nature partakes both of the real and of the personal action, such as a claim for the ownership of real property, and also for the fruits it has produced, or their value.

Jurisdiction.

(1) The claim for fruits and revenues is a mere incident of the real action, and may be brought with it in the parish where the land is situated, although the defendant does not reside there. And after the suit is once brought the elimination of the question of title or of possession of the realty does not divest the Court of jurisdiction as to the liability for fruits and revenues, because jurisdiction, having once vested, cannot be divested by a judgment on a part of the matter in controversy. Winter, 6 R. 466; Maduel, 30 A. 1405.

Likewise, a party may abandon his appeal from the portion of the judgment which passed upon the title to the property, and retain the appeal as to the fruits or their value. *Dwight*, 12 A. 860.

Art. 8. The Second General Division of Actions classes them into civil and criminal actions.

Art. 9. A Civil Action is one which is brought for private interest, such as a suit to obtain the payment of a sum due, the restitution of property, or reparation for injury done by words or action.

Art. 10. A Criminal Action is one which is instituted in the name of the State by its proper officers, in order to obtain the public reparation of any crime or misdemeanor. This action comes under the head of penal jurisprudence.

(1) The forfeiture of an appearance bond is an incident to a criminal proceeding, and, therefore, belongs to that class. *O'Rourke*, 49 A. 1567; *Alexander*, 46 A. 550; *Toups*, 44 A. 901; *Doyle*, 42 A. 642; *Burns*, 38 A. 363; *Williams*, 37 A. 200; *Cornig*, 42 A. 419; *Balize*, 38 A. 543, 546.

A Third Division.

Art. 11. Actions, with respect to their object, are divided into two classes; those by which movables, and those by which immovables are claimed.

Art. 12. Although Incorporeal Rights be not in reality movables nor immovables, they are nevertheless placed by law in one of those two classes.

Actions tending to recover an immovable, or a real right, or a universality of things, such as an inheritance, are considered as *real*; while actions for the recovery of a movable or of a sum of money, though accompanied with a mortgage, are *not real actions*.

Art. 41 et seq.

R. C. C., Arts. 474, 2010, 471.

(1) A suit for the enforcement of a mortgage debt is not a real action. Wisdom, 31 A. 52, 60.

But the hypothecary action proper (C. P. 68) is a real action. Labauve, 31 A. 141; Wisdom, 31 A. 61.

The distinction between the above two cases is that when the plaintiff proceeds against his mortgagor or his heirs the action is personal, because they are personally bound for the debt; but when he proceeds against a third possessor the action is real, because the third possessor is not personally liable beyond the yielding up of the property to pay the debt, and the action is in reality *ad rem*. See note 1 to Art. 61 for further view.

CHAPTER II.

OF THE RULES APPLICABLE TO ALL

CIVIL ACTIONS.

What Law Governs.

Art. 13. The forms, the effects, and the prescription of actions, are governed by the law of the place where they are brought; but contracts are governed by the law of the place where they were entered into.

R. C. C. 10, 3532.

(1) This article states the usual rule regarding prescription. Newman, 107 La. 317. And contracts. First Bank, 123 La. 1019; Miller, 110 La. 652.

R. C. C. 3532, however, provides an exception in the case where prescription has accrued under the laws of another State, and the debtor subsequently comes to this State. Do. R. S. 2808; Newman, 107 La. 315.

(2) Art. 13 is a very general statement of the law. Contracts are governed by the law of the place where they are to have effect. C. C. 10; Webb, 116 La. 905.

As to disposition in other states and countries of property in Louisiana, see C. C., Arts. 10, 491, 1596, 1688, 1588.

(3) The *lex loci contractus* governs privileges. The vendor's privilege does not attach, unless the sale was a Louisiana contract. Brent, 16 A. 158. Or to be executed in Louisiana. McIlvaine, 36 A. 359; Newman, 43 A. 712; De la Vergne, 51 A. 1743; Chaffin, 41 A. 1048. The place where the sale was executed or consummated is the important factor. Witt, 122 La. 149; Welsh, 111 La. 802.

When Right of Action Arises.

Art. 14. Every obligation gives impliedly a right of action to enforce its execution; but the obligation and the right of action do not always arise at the same time. Thus in contracts to be performed at a future period, the obligation which grows out of the contract, arises at the very moment of making it, but the right of action growing out of it, arises only when the stipulated term has arrived.

C. P. 158.

R. C. C. 2052.

Bank, 49 A. 943.

(1) Suit brought before obligation is due is premature, and must be dismissed, even though the obligation matures before the trial. C. P. 158; Catlett, 23 A. 577; Egan, 46 A. 481; Christen, 24 A. 50; Sondheimer, 121 La. 789; Ex rel. Merz, 31 A. 120; Bank, 49 A. 944; Bank, 41 A. 227; Chaffin, 44 A. 518; Hewitt, 47 A. 742.

But it has been held that plaintiff will be permitted to amend so as to cover obligations matured since filing of the original petition. Warfield, 23 A. 612; McDaniel, 34 A. 341. The Warfield case was a sequestration suit, and held that sequestration could be sued out before maturity of debt (citing Gardner, 4 A. 184, and Neilson, 17 La. 212). In Egan, 46 A. 481, the Court attempts to differentiate the Warfield case, on the ground that the suit was on a series of notes, only one of which had not matured. The McDaniel case stands alone, and is not supported by any other authority. In Bank, 49 A. 945, it is cited as sustaining an entirely different proposition.

See notes to Art. 158.

Interest in Action.

Art. 15. An action can only be brought by one having a real and actual interest which he pursues, but as soon as that interest arises he may bring his action.

This article lays down a rule of great importance. The article is frequently cited by our Supreme Court, and the rule is frequently applied without citation of the article. It is impossible to give every case where the rule has been applied. The following are illustrations:

(1) One who has lost title to his property by a tax sale has no interest to attack a subsequent sale of the property made by the tax purchaser or adjudicatee. Quaker Co., 131 La. 1003, and cases there cited—viz.: Morrison, 26 A. 699; George, 109 La. 823; Surget, 43 A. 873; Woodfork, 120 La. 496; Gouaux, 123 La. 695; Smith, 118 La. 1055; West, 48 A. 922; West, 52 A. 381; Breaux, 43 A. 426; Reinach, 46 A. 151.

(2) One whose property has been destroyed by fire through the negligence of the defendant, and who has been paid a part of his loss by an insurance company (the company being subrogated to plaintiff's rights pro tanto), has an interest to sue for the entire loss in his own name. The action is indivisible. Hanton, 124 La. 562, 568.

(3) Taxpayers and property owners have no standing in court, as such, to contest city ordinances, unless the damage or danger of injury to their property rights is actual and real. Morris, 121 La. 1016, 1022; Kohnke, 109 La. 839, 850; Johnson, 105 La. 150; Conery, 41 A. 921; Murphy, 118 La. 402, 410; Taxpayers, 108 La. 583; Bank, 27 A. 446.

(4) A mere citizen and resident cannot control the discretion of the governing bodies of municipal corporations without showing special injury to himself. Laforest, 117 La. 266, 268; Dupuy, 115 La. 579, 587.

(5) But property owners and taxpayers have an interest to contest the legality of municipal ordinances and laws which increase the burden of taxation (however little) or otherwise injuriously affect taxpayers and their property. Morris, 121 La. 1020; Kohnke, 109 La. 850;

Item Co., 51 A. 716; Ex rel. Orr, 50 A. 880; Laforest, 117 La. 268; Isadore, 108 La. 677, 680, 59 L. R. A. 723; Handy, 39 A. 107; Conery, 39 A. 770, 772; Murphy, 118 La. 401, 409.

(6) Inhabitants of a parish who are injured by the action or inaction of its Police Jury have an interest to compel them to perform their duty under the law. Watts, 11 A. 141.

(7) But neither inhabitants nor property owners have such an interest in the contracts of a municipality as to give them a right of action thereon, either for performance or for damages for breach, unless the contract contained a stipulation pour autrui in their favor and accepted by them. Allen, 113 La. 1094, 68 L. R. A. 650, 104 A. S. R. 525 (citing Loeber, 41 A. 1151; Barber, 49 A. 1608; Oliff, 52 A. 1204; and many authorities from other jurisdictions; and overruling, in this respect, Planters', 52 A. 1243). A statutory exception is made by Act 133 of 1888, p. 191, providing mandamus by five taxpayers to enforce certain contracts.

See Art. 35 and notes.

(8) Thus, one in possession as owner has no right to enjoin the sale of the property at probate or other public sale. Rapides Co., 111 La. 793; Seymour, 12 La. 123; Morrison, 26 A. 700; Railroad, 52 A. 1831, 28 Sou. 311.

(9) Certain inhabitants of a locality cannot, without showing special individual injury to themselves, recover damages from one who has torn down a school building erected for the people of that locality. Lomax, 113 La. 850, 37 Sou. 777.

(10) The insured and his assignee, either or both, have the right to sue upon a policy. Elgutter, 52 A. 1733, 1737. But neither can sue for payment where, by its terms, the policy is payable to another. Lane, 35 A. 224.

(11) The remedy granted by Art. 3057, R. C. C., is said to be an exception to Art. 15, C. P., and is not to be extended by analogy. The surety must stand on the right of action given by 3057, and cannot borrow by anticipation a right of action from the creditor. Derouin, 49 A. 1131.

(12) The third possessor of property seized and sold to pay a previous mortgage has no interest as such to inquire whether the vendee paid the price or complied with terms. Derouin, 46 A. 1388, 1393; Lane, 36 A. 773.

(13) The father of a minor has no right to sue for the annulment of the minor's marriage; for, unless the marriage was absolutely null, the minor must sue in his own name, being emancipated by marriage. The status remains until annulled. Delpit, 51 A. 923, 926.

(14) *Private persons* can complain, in a civil action, of a *public* nuisance, or of a violation of municipal ordinances, only when they allege and show injury or damage to themselves resulting therefrom. Werges, 35 A. 641. And not common to all other persons. Irwin, 37 A. 64, 65; Blanc, 36 A. 162, 169, 51 Am. Rep. 7; Bell, 38 A. 555; Darcantel, 44 A. 633, 645; Koehl, 47 A. 1316, 1320.

(15) An *insolvent* has no interest in property after he has surrendered it. Steib, 23 A. 337. Except to receive the residuum, and for that purpose to force a final settlement. Mudge, 10 R. 460.

(16) Interest must be present, legal and sufficient. L. & A. Co., 115 La. 936; Peters, 114 La. 952, 957; Williams, 107 La. 610; Ashby, 39 A. 105; Corral, 37 A. 803; Tiner, 5 A. 756; Coleman, 37 A. 566; French, 24 A. 285; Byerly, 24 A. 115. Public Administrator seeking to remove administrator. Saloy, 44 A. 433; Bossu, 115 La. 18; Withers, 45 A. 564; Burnside, 34 A. 728. Sheriff after return of writ. Caldwell, 15 A. 617; Carroll, 21 A. 561; Lacroix, 41 A. 1018; Zimmermann, 36 A. 65; Nihoul, 35 A. 565.

(17) Thus, a *lessee* cannot arrest executory process, since, if his lease was duly recorded before the mortgage, the purchaser cannot evict him. Carroll, 35 A. 83.

(18) The State, in building levees, acts in the exercise of police power, and damage resulting to private owners therefrom is *damnum absque injuria*. Egan, 45 A. 1357, 1364; Bass, 34 A. 494. Land taken for levee purposes is not expropriated, but appropriated under a servitude to which every owner's land has always been subjected. Peart, 45 A. 421, 12 Sou. 490. And the same applies to

land taken for street or road next to river. Ruch, 43 A. 275, 9 Sou. 473. But property not bordering river is not burdened with such servitude, and must be paid for. Pontchartrain Co., 49 A. 570, 572.

(19) The doctrine of *damnum absque injuria* extends to other cases where damage is inflicted on individuals, under the police power of the State. N. O. Gas Co., 111 La. 838, 35 Sou. 929.

(20) A *debtor* has no interest in the *assignment* of the debt unless he is deprived of defenses against the original creditor. Bonner, 43 A. 1036, 1039; Long, 35 A. 384. Nor can he, when sued by original creditor, object to a partial assignment, of which he had had no notice, and to which he had not consented. Belden, 38 A. 391.

(21) Any defendant must show his interest in any particular exception or defense which he makes. Beland, 46 A. 326, 14 Sou. 843. Cannot urge defenses peculiar to codefendant. Chaffe, 37 A. 184; Chase, 32 A. 460.

(22) A creditor has no interest to oppose payment of other claims by a succession where there is ample to pay him. Gohs, 37 A. 428. Nor where there will not be sufficient to pay him whether the claim he opposes be paid or not. C. & B. Co., 49 A. 123, 125.

(23) A mortgage creditor cannot attack the validity of a sale of the property if sold subject to his mortgage. Levi, 33 A. 532; Labauve, 26 A. 440.

(24) A receiver, sequestrator, or a like officer, has no interest as such to resist an order of court vacating his appointment. Mauberret, 45 A. 241.

(25) A creditor has an interest to plead prescription against another creditor whose claim, if allowed, would defeat or diminish his own claim. Maskell, 12 A. 661; Bertrand, 39 A. 436.

(26) And creditor can set up ownership in debtor and have property decreed to belong to debtor when the debtor cannot or will not do so. Logan, 30 A. 727; Spencer, 33 A. 906; Forstall, 34 A. 775; Moresi, 115 La. 796; Jack, 34 A. 736, 740; Belcher, 114 La. 641, 643.

See note 5 to Art. 45.

(27) An attorney who is entitled to a fee to be paid out of a judgment obtained by him has interest to sue to revive the judgment. *Martinez*, 32 A. 305; *Bertron*, 43 A. 1179.

(28) Any co-owner may recover the entire property, or the whole amount of damages, from a mere trespasser. *Richardson*, 120 La. 223; *Becnel*, 40 A. 112; *Pearson*, 6 A. 232.

See note 2 to Art. 45.

(29) One must proceed in his proper name, or this article may be invoked against him. *Great Southern Lumber Co.*, 132 La. 1000.

Continuation of Interest.

(30) The interest required by this article must continue until the day of judgment; and, if the plaintiff lose his real and actual interest or right before final judgment, he must be dismissed. *Ross*, 14 A. 812.

(31) A very perplexing question arises where the plaintiff, after a final judgment in his favor, loses all interest in the suit pending a suspensive appeal from such judgment.

An illustration is afforded by the case of *Bauland vs. Leon Godchaux Co., Ltd.*, decided by the Court of Appeal, First Circuit of Louisiana. The defendant company had built a railroad upon a public road in Assumption Parish. Bauland resided upon, and kept a store upon, this road, and the road was his only means of ingress and egress. He brought suit to have the railroad removed, and obtained judgment in the District Court of Assumption Parish, decreeing that the defendant company remove the railroad. The defendant took a suspensive appeal from the judgment to the Court of Appeal. Hearing in the Court of Appeal was delayed for a year or more, and in the meantime Bauland had sold out his store and removed from the Parish of Assumption. At the hearing in the Court of Appeal defendant made this fact appear to said court by affidavits.

The Court of Appeal, finding that Bauland's interest and right to bring the suit lay in the fact of his peculiar and particular use for the public road (see No. 14, above), ordered the case to be remanded to the District Court to

try the question of plaintiff's present interest in the suit. In the opinion, Caillouet, Judge, uses the following language:

" * * * If it be established that the plaintiff and appellee has no further interest in the matter at issue herein, further proceedings may have to be abated. * * *

"It is not only necessary that the plaintiff should have had the right to have the nuisance abated at the time he brought his action and obtained judgment below, but that right must also exist *now*, when the issue is to be finally determined. If the actual interest which gave him the right to proceed originally against the defendant has ceased to exist, so has the right, and he must see judgment finally go against him."

The Court of Appeal cited no authority, except *Ross vs. Crockett*, 14 A. 811, which is not in point as to what an appellate court should do where plaintiff has lost his interest after obtaining a final judgment in the trial court.

The cause was not further contested after the remand, other plaintiffs residing on the road bringing suit, and the railroad being removed under a compromise of the later suit.

What interests us now is to determine, if possible, whether the Court of Appeal took the proper view and rendered the proper order on the question.

Art. 564, C. P., defines an appeal to be "an act by which one of the parties to a suit has recourse to a superior tribunal, in order to have the judgment of an inferior court corrected."

If the judgment of the District Court was correct at the time it was rendered, it does not seem that the appellate court should reverse it on account of anything that has transpired since it was rendered.

Plaintiff's loss of interest in the judgment would be ground on which the defendant might institute original proceedings in the lower court to prevent the execution of the judgment by plaintiff; but certainly could not be ground for the reversal of the original judgment in the Court of Appeal.

It strikes the writer forcibly that when the Court of Appeal said "further proceedings may have to be

abated," they struck the right key; but when they said later in the opinion, "if the actual interest has ceased to exist, plaintiff must see judgment finally go against him," they went entirely wrong.

It strikes the writer that it was the plain duty of the Court of Appeal, upon the filing of appellant's motion and affidavit, as the appellee was seeking no amendment or change in the judgment, to at once dismiss the appeal, of course at the cost of appellant. This in the light of decisions rendered by the Supreme Court, as follows:

In re Lambert, 115 La. 469, 39 Sou. 447. Here an interdict died pending an appeal from a judgment concerning a contest for his curatorship. Appeal dismissed at cost of appellant, reserving him his right to contest in some other proceeding his liability for the costs for which condemned by the judgment appealed from.

In re Wilds, 6 Rob. 31. A minor married pending an appeal from a judgment removing her tutrix. Appeal dismissed at appellant's cost.

LeBlanc vs. Democratic Committee, 123 La. 384, 48 Sou. 1005. Appellant had obtained a judgment ordering the committee to recanvass the returns in a primary election. Pending suspensive appeal, the regular election had taken place, and, appellee having no longer an actual interest in being declared the Democratic nominee, the appeal was dismissed at appellant's cost. This case is almost the counterpart of the Bauland case, *supra*.

In re Jones, 117 La. 106, 41 Sou. 431. Appellant interdict died pending appeal from judgment of interdiction. The Supreme Court said it could not render a judgment, and that each party must pay his own costs. It then ordered the appeal dismissed. The writer thinks that, in the light of the above cases, the Court was in error as to costs; that the order dismissing the appeal was a judgment; and that the appeal should have been dismissed at appellant's cost.

Costs are a mere incident of the suit, and are placed by the law on the party cast. A Court which cannot determine a cause has no power whatever over the costs. They fall where the law places them. Begbie, 49 L. R. A. 141, 128 Cal. 154, 60 Pac. 667, cited with approval in Lambert's case, *supra*.

In Alexandria Cooperage Co. vs. R. R. Commission, 127

La. 1085, 54 Sou. 359, an appeal was taken from a judgment maintaining an order of the Railroad Commission. Appellant informed the Court that the order complained of had been rescinded pending the appeal. The Court affirmed the judgment at appellant's cost. This was put on the ground that appellant did not prosecute the appeal. The writer apprehends that if the rescission of the order had been made to appear to the Court by consent or by proper evidence, instead of by the mere information of the appellant, the Court would have simply dismissed the appeal at appellant's cost.

When Action Held in Abeyance.

Art. 16. In all actions which are to be brought at the end of a stated period, the right of action subsists until the last day has expired.

R. C. C. 2057 et seq.

(1) It would seem that the words "in abeyance" should be read into this article after the word "subsists."

No Action on Natural Obligations.

Art. 17. Natural obligations give no right of action, but what has been paid pursuant to those obligations is not subject to repetition.

Those are natural obligations, for which the law gives no right of action; they arise on contracts entered into by persons who, though possessed of sound discretion and judgment enabling them to make contracts, are nevertheless disqualified by law from contracting, as are the contracts of married women made without the authorization of their husbands.

R. C. C. 1757, 1758, 1759, 2133, 1846, 2303.

(1) Where a license has been voluntarily paid, it cannot be recovered back, on the ground of informalities in the ordinance levying same. Fuselier, 107 La. 221; Campbell, 12 A. 34; F. & T. Ins. Co., 25 A. 454. It is otherwise where the profession or property was exempt

by law. Same decisions. Bank of New Orleans, 12 A. 421; Catholic Society, 10 A. 73.

For definition, kinds and effects of natural obligations, see the above-cited articles of R. C. C.

Action for Repetition.

Art. 18. He who pays through error what he does not owe, has an action for the repetition of what he has thus paid, unless there was a natural obligation to make such payment; but he must prove that he paid through error, otherwise it shall be presumed that he intended to give.

R. C. C. 2133, 2301 et seq., 1757 et seq., 1846, 2443, 3005, 495.

See Annotations to Art. 17.

(1) No natural obligation to pay compound interest, and, if paid in error, the amount over what is really due can be recovered. Major, 14 A. 10.

(2) Plaintiff must allege and prove (1) payment in error; (2) that money paid was not due; and (3) that there was no natural obligation to pay. Hills, 7 R. 522.

(3) Example of natural obligation. Worsley, 9 R. 324. Illustrations, Worsley, 9 R. 338.

(4) Payment of a note in error before maturity does not extinguish it nor affect the liability of any party to it. Union Bank, 15 La. 314.

Immoral Obligations.

Art. 19. Obligations contrary to justice, good faith, or good morals, such as those by which a reward is promised to another to commit a crime, give no right of action to either party to enforce the execution of the contract.

But if the reward promised has been paid, no action can be brought to obtain the repayment of the amount.

R. C. C. 11, 709, 1519, 1891, 1892, 1893, 1895, 2031, 2325, 2804, 2983.

(1) A partner in a gambling partnership cannot compel his copartner to account. *Martin*, 128 A. 442, 54 Sou. 985. Nor can an employee of a gambling-house recover his salary or sue for damages for discharge. *Britt*, 118 La. 597, 43 Sou. 248.

An officer, forbidden by the law to contract with or work for a municipal corporation, cannot recover on any such contract; nor where he has sold the contract to a third person can he recover on a note given for the price thereof. *Cummings*, 80 A. 207.

An agreement between two railroads to divide traffic earnings between given points, where they are naturally competitors, is against public policy as stifling competition, and as monopolistic, and cannot be enforced, and nothing can be recovered thereunder. *Railroad vs. Railway*, 41 A. 970, 6 Sou. 888, 17 A. S. R. 445; affirmed, 137 U. S. 48, 11 S. C. 10, 34 L. Ed. 614.

One who has by his own wrongful acts attempted to divest another of his property through a tax sale cannot claim the property under such sale, and cannot invoke the prescription of Art. 233 of the Constitution of 1898. *Pitre*, 110 La. 164, 178, 179.

The Court will have nothing to do with a suit concerning a fund to influence the Legislature. *Durbridge*, 27 A. 676.

A contract to divide the salary of a public office cannot be enforced. *Glover*, 38 A. 634.

Where turpitude or immorality, as concubinage, is the motive or cause of the claim sued on, it cannot be enforced. The taint affects fatally the claim in all its parts.

Simpson, 51 A. 1325, and cases cited at p. 1362 *et seq.*

But there is nothing immoral in the sale of furniture, or the lease of a house, and the vendor or lessor can recover the price or the rent, although he knew that the purchase or the lease was for a house of prostitution. The immorality was not the consideration of the contract.

Hubbard, 24 A. 591; *Lyman*, 24 A. 625; *Sampson*, 25 A. 78; *Mahood*, 26 A. 108, 21 Am. Rep. 546.

(2) Maxims stating the sense of this article:

"One who comes into court must come with clean hands." *Pitre*, 110 La. 164, 178, 179.

"Ex turpe causa non oritur actio." No action arises from a base cause.

“*Nemo allegans suam turpitudinem est audiendus.*” No man can be heard to allege his own turpitude.

Cause of Action May Be Used as Defense.

Art. 20. He who has a right of action to claim what is due to him, has a right yet more evident to use the same cause of action as an exception, in order to preserve his rights.

(1) Dissolution of contract may be demanded by suit or by exception. R. C. C. 2047; Williams, 132 La. 2, 7, 60 Sou. 699.

(2) Failure of suspensive condition is a defense. Bouligny, 35 A. 748, 751; Walker, 18 A. 714. And so with resolutory condition, Dubois, 14 A. 427.

(3) Can use as a shield what might have been employed as a weapon. Insurance Co., 12 R. 472; Hinrichs, 50 A. 1218; Andrews, 122 La. 470.

(4) But grounds for a petitory action cannot be used as defense to a possessory action. Hermitage Co., 46 A. 425, 430, 14 Sou. 919.

(5) Although a cause of action is prescribed when used as ground for a direct action, it may still be used as a defense. “*Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum.*” Things which are temporary for the purpose of action are perpetual for the purpose of exception (defense). Bushnell, 4 N. S. 500; Davenport’s Heirs, 3 N. S. 695; Thompson, 1 N. S. 468; Edwards, 46 A. 360, 15 Sou. 61; Dickason, 13 A. 250; Wright, 13 A. 234; Lafiton, 12 A. 164; Paxton, 2 La. 137; Broussard, 18 A. 593; Walker, 18 A. 714.

(6) And where defendant in executory process enjoins the execution, his allegations are exceptions or defenses, although the injunction suit is a separate suit, and the rule “*quae temporalia*” applies in his favor. Davis, 14 A. 868; Bushnell, 4 N. S. 500.

(7) But reconventional demands are not exceptions to which “*quae temporalia*” applies. It only applies to those which are attached to the demand of plaintiff. Girod, 2

A. 546; Boeto, 3 A. 141; Harris, 16 A. 140; Chadwick, 104 La. 42. And so with claims pleaded in compensation. Loony, 35 A. 1015.

Death Does Not Abate Action.

Art. 21. Actions do not abate by the death of one of the parties after answer filed.

C. P. 361, 120.

R. C. C. 945.

(1) A corporation becoming defunct does not abate a suit against it. Bradshaw, 132 La. 829, 832, 61 Sou. 839.

(2) Filing an exception of no cause of action is a waiver of the right to claim that suit has abated by death of plaintiff before answer filed. Gurley, 124 La. 391, 395, 50 Sou. 411.

(3) "Actio personalis moritur cum persona." Personal actions die with the person. In Louisiana they survive only to those beneficiaries provided in Art. 2315, R. C. C., as amended by Act 120 of 1908, p. 178. Therefore, if plaintiff dies before judgment is rendered, the action survives only in favor of the statutory beneficiaries. In default of these it abates. Chivers, 50 A. 57; Payne, 117 La. 983, 985, 42 Sou. 475. Such is the law under the rule of *stare decisis*. There is much to be said on the other side. See article by R. M. Tullis, La. State University Quarterly, Apr., 1911, Vol. VI, p. 43. See note 1 to Art. 22.

(4) Widow in community must be made party as such, and not as heir. Quality of heirship and virile share of each heir must be shown. Dirmeyer, 39 A. 961, 966, 3 Sou. 132.

(5) Under old decisions, the action does not seem to abate, whether answer filed or not. Todd, 16 A. 162; McCord, 1 R. 519. But if it is the defendant who dies, heir must be cited and allowed legal delays. Bedford, 18 A. 40.

(6) Where, after issue joined, the executor makes himself party in place of deceased plaintiff, defendant is

entitled to notice, but cannot claim any delays. *Woodman*, 15 A. 508.

(7) On the day fixed for trial, oral suggestion of the death of plaintiff is not sufficient. If plaintiff's counsel refuses to produce proof of death, or to take further action, judgment of nonsuit must be rendered. *Hawkins*, 3 A. 547.

Actions Are Property, Heritable, When.

Art. 22. Actions arising from obligations are the property of him in favor of whom they have been contracted; they are transmitted with his estate to his heirs, who may carry them on in their own name.

C. P. 113.

R. C. C. 945, 1763, 1999.

(1) "Obligations" in its broadest sense includes rights of action arising, not only from contracts, but also from quasi-contracts, offenses and quasi-offenses. R. C. C., Title V; C. P., Art. 28. A liberal interpretation of this article would, therefore, make all actions heritable. But such is not the jurisprudence. Actions *ex contractu* are universally conceded to be heritable, except the action for breach of promise of marriage. See note, 10 A. & E. Ann. Cases, 725.

It cannot be said that all actions, *ex delicto* or in tort, are not heritable, as seems to be the inadvertent dictum of the Court in *Walker*, 110 La. 719, and in the syllabus to *Huberwald*, 50 A. 477. Examine these two decisions. They assist in establishing what the writer believes to be the true rule—viz.: that all actions are heritable except those for the reparation of purely personal injuries. The maxim is: "*Actio personalis moritur cum persona*." The personal action dies with the person. See note 3 to Art. 21. It is evident that the word "personal" is here used in a different sense from that intended in Arts. 3, 26 *et seq.* of C. P. The word as here used applies to actions which seek reparation for wrongs done to those rights which attach strictly to the person, and does not apply to wrongs done to property rights. The personal rights are embraced in the right to security in the enjoyment of

life, liberty, limbs, body, health and reputation. The right of action for breach of promise of marriage is also considered a right which attaches so exclusively to the person, and not to property, that it dies with the person.

In the earlier history of the State, actions were, in general, considered heritable, under general law. R. C. C. 871, 872, 874, 884. Prior to 1850, the question of the non-heritability of purely personal actions had received little attention.

In 1851 came the decision in *Hubgh*, 6 A. 495, 54 A. D. 565, declaring that no action lay for the death of a free human being.

Although this decision did not touch upon the question of heritability, it is supposed to have caused the amendment of March, 1855, to Art. 2294 (now Art. 2315) of the Civil Code, providing for the survival of the action in case of death. *Earhart*, 17 A. 245.

Now it cannot be doubted that prior to the amendment of 1855 many actions arising under Art. 2294 (2315), C. C., were heritable. Cutting another's timber is a pure tort, and the action therefor is purely *ex delicto*. If A cuts and removes B's timber to-day, and B dies to-morrow, B's heirs surely inherited from him the right to recover for the timber taken. This action was given by Art. 2294 to the same extent as an action for any other offense.

It was, therefore, most unfortunate that the Legislature, in 1855, in seeking to provide for the survival of the action for personal injuries in certain named beneficiaries, should have adopted this legislation in the shape of an amendment to Art. 2294.

Art. 2294, as thus amended, became Art. 2315 of the Revised Code of 1870, which was again amended by Act 71 of 1884, increasing the number of possible beneficiaries. *Vaughn*, 119 La. 64.

The article has still again been amended by Act 120 of 1908, p. 178, further increasing the number of possible beneficiaries.

The survival provided for is not an inheritance. *Vaughn*, 119 La. 64. It is a subrogation. *Weeks*, 32 A. 617. The right survives, not to the heirs at law, but only to the statutory beneficiaries. *Payne*, 117 La. 986.

Now all actions in tort, or *ex delicto*—in other words,

all actions which do not spring from contract or quasi-contract, arise under Art. 2315 of the R. C. C., whether the damage has been to strictly personal rights or to property rights.

Query: Do these amendments, referring as they do to the right of action given by Art. 2315 (2294), take away the heritability of those rights of action under this article which were heritable, or must the effect of these amendments be limited to those rights of action which expired with the person?

The Supreme Court has repeatedly in general language said that the amendments apply to all actions in tort or *ex delicto*. Payne, 117 La. 986; Walker, 110 La. 719; Breaux's Digest, p. 695, No. 126.

The writer apprehends, however, that these dicta should be held to apply to only those torts of the kind under consideration by the Court at the time, and not to all torts.

It cannot be presumed that the Legislature intended to provide for the survival of those actions which already survived in the heirs, but it must be presumed that they intended to provide for the survival only of those actions which died with the person; and we believe that the Court in a case presenting such a question would so hold. Our conclusion is that a right of action for tort which would have survived to the heirs prior to the amendment of 1855 is still heritable by them, and the right of action does not survive merely to the beneficiaries provided by the amendments.

The action in Gurley, 124 La. 390, 50 Sou. 411, was an action purely *ex delicto*. It did not arise from a contract or quasi-contract. True, it was an injunction suit to prevent a wrong. But the principle is the same. A person can surely bring suit to prevent any wrong the commission of which would entitle him to damages. The Court held that such an action passed to the legal representatives, and said that the contention that the action was purely personal to the deceased could hardly be serious. See note (4) to Art. 25.

(2) The right of action given to certain beneficiaries by Art. 2315, R. C. C., as amended by Act 120, 1908, p. 178, being personal to those beneficiaries, it is apprehended that, if all the beneficiaries die before obtaining judgment, the action dies with them. It survives as long

as any beneficiary remains living. See note, *Ann. Cas.* 1913 E (Vol. 30, A. & E. *Ann. Cas.*), 995. Compare *Huberwald*, 50 A. 479, where minor beneficiary under prior amendment became of age before bringing suit, and was held to have no right of action. Suppose he had brought suit during minority, and became of age before judgment. Would not action have abated under rule in *Chivers*, 50 A. 57, and *Payne*, 117 La. 983?

(3) Where the injured party has used and exhausted his right of action, there is nothing to survive. *Dougherty*, 133 La. 993, 63 Sou. 493.

(4) An action is so far property that it is subject to seizure. *Nugent*, 33 A. 271; *Jack*, 34 A. 738; *Lehmann*, 110 La. 1079, 35 Sou. 296; *Garlick*, 132 La. 670, 61 Sou. 732.

But can the rights of plaintiff in an action purely personal to himself be seized? It is believed not. See *Selden*, 87 N. E. 860, 239 Ill. 67, where it is held that, as a general rule, "survivability" and "assignability" of causes of action are convertible terms. *Irion*, 132 La. 60, 60 Sou. 719; *R. C. C.* 2009.

Rights Pass to Universal Successors.

Art. 23. The universal successor or successors by an universal title of a deceased person, such as his heirs or universal legatees, are entitled to the same actions and exceptions as the person to whom they succeed; but they cannot claim, on their own behalf, any right which he had not himself, for this reason, that no one can transfer a better title to another than that which he himself had.

C. P. 113.

R. C. C. 945, 871, 872, 874, 884, 2292.

This article and the articles of the C. C. and C. P. cited *supra* strongly incline the writer to the opinion that prior to the act of March, 1855, amending Art. 2315 (2294) of C. C., referred to in note (1) to Art. 22, all actions were heritable. As before observed, this legislation appears to have been prompted by a misapprehension of

the decision in Hubgh, 6 A. 495. See Earhart, 17 A. 245. Although neither the Hubgh case nor the case of Hermann, 11 A. 21, sustaining it, touched on the transmission of actions, but only held that one person had no right of action for the death of another, it is remarkable how frequently these two cases have been cited to show that prior to 1855 actions for tort were not heritable. Earhart, 17 A. 245; Walton, 34 A. 914; Huberwald, 50 A. 477; Walker, 110 La. 719; Vaughn, 119 La. 63; Breaux's Digest, p. 695, No. 126; see note (4) to Art. 25.

Things Derived from Deceased by Particular Title.

Art. 24. The rule laid down in the preceding article takes place also with respect to the successors of a deceased person claiming a thing by virtue of a particular title; that is to say, by sale, donation, or legacy, but so far only as concerns the thing itself of which the deceased has thus disposed of in their favor.

Universal Successors Liable for Torts of Deceased.

Art. 25. Heirs or universal legatees may be sued for civil reparation of the injury caused by the crimes and misdemeanors of the deceased, whose succession they have accepted, although no action was instituted for that purpose against the deceased during his life, and although neither he nor his heirs have been benefited by such an offence.

R. C. C. 2315 et seq.

C. P. 40, 27.

Revised Statutes, 985.

(1) "Misdemeanors" in a strictly legal sense means those crimes of a less degree than felony. As the word "crimes," which is used in this article, includes both felonies and misdemeanors, it is reasonable to interpret the word "misdemeanors" as applying to all torts or of-

fenses, whether or not they have been made criminal in this State; and such is the interpretation placed on the word as used in this article. Johnson, 118 La. 453; Dir-meyer, 39 A. 961; Edwards, 30 A. 926; Smith, 6 A. 705.

(2) But exemplary or vindictive damages (smart money) cannot be recovered from the succession of deceased. Only actual damages to person or property can be recovered from succession. Edwards, 30 A. 926; Dir-meyer, 39 A. 964; Johnson, 122 La. 118, 125, 47 Sou. 422. But damages for injury to feelings are actual, and not vindictive. Johnson, 118 La. 455, overruling, in this respect, Edwards, 30 A. 926, and Jones, 29 A. 564.

(3) Where succession is under administration, administrator or executor is party to be sued. Smith, 6 A. 704. Unless widow and heirs have renounced, they may be sued each for virile share, if no administration in esse. Edwards, 30 A. 926. But each must be sued in proper capacity, and virile share of each must be alleged. Dir-meyer, 39 A. 961, 966, 3 Sou. 132.

(4) This article is directly the contrary of the common law. At common law, all actions, as well as rights of action ex delicto, abated with the death of either party, the wrongdoer or the party injured. See Miller, 6 A. & E. Ann. Cas. 513, and note.

This article in the clearest terms makes the right of action to survive against the succession of the wrongdoer; and, as before remarked, the writer believes it was the intent of Arts. 21, 22 and 23 to make the right of action, as well as the action itself, survive in favor of the succession of the one injured, viewing these articles in the light of the general articles of the C. C. cited under the three said articles.

In view of these general provisions of the law, it would have required a special enactment to take away the heritability of the actions given by Art. 2315 (2294), C. C., as it read prior to Act 223 of 1855. Had it been intended that the right of action given by Art. 2294 (2315) should not survive to the succession, the following clause, or one of like import, would have been added—viz.: "The right of this action shall expire with the life of the person injured."

It is hard to imagine that the early code-makers in-

tended that actions *ex delicto* should survive against the succession of the wrongdoer, and not in favor of the succession of the injured party. It was clearly the opinion of our Supreme Court in 1854 that the right of action for tort survived to the succession of the injured party, as shown in *Vincent*, 9 A. 463. We have not before cited this case, because the Supreme Court differentiated it in *Chivers*, 50 A. 63, and in *Payne*, 117 La. 985, because judgment had been rendered in the lower court before the plaintiff died. But the language of the Court in the *Vincent* case clearly shows what their opinion was of the survival of the right of action in general.

In *Beers*, 35 A. 1139, the Supreme Court gave judgment for damages in favor of the succession of the injured party, against the succession of the wrongdoer, in an action purely *ex delicto*. The question of the survival of the right or of the action seems not to have been raised, but to have been taken for granted.

The preceding three articles have been rarely cited in our jurisprudence, and, the writer believes, have been often overlooked. In *Jones*, 29 A. 564, the Court entirely overlooks Art. 25, C. P., and solemnly declares that actions for malicious wrongs die with the wrongdoer (p. 567). This is overruled in *Johnson*, 118 La. 455.

We leave this chapter with the observation that our jurisprudence is by no means clear as to what actions and rights of actions survive to the succession, and as to which survive only to the beneficiaries provided by Act 120 of 1908. We repeat that it was the mistaken construction given to the decision in the *Hubgh* case, 6 A. 495, which provoked the amendment of 1855, which has complicated and mystified the jurisprudence. It is strongly recommended that the Legislature amend Act 120 of 1908 so as to make all actions and rights of action survive to the succession, and thus put an end to all doubt and uncertainty. The paragraph giving the right of action for damages sustained from the death of parent, child, husband or wife, which was the only legislation made necessary by the decision in the *Hubgh* case, could be retained in proper form.

(5) Action survives only against heirs who have accepted. *Deshotels*, 134 La. 1076. But see note 1 to Art. 120.

CHAPTER III.

OF THE RULES PECULIAR TO THE DIFFER- ENT KINDS OF CIVIL ACTIONS.

Section I.

Of the Several Kinds of Personal Actions, and of the Rules Which Govern Them.

When Personal Action Lies.

Art. 26. A Personal Action lies against him who has bound himself towards another, personally and independently of the property which he possesses.

C. P., Art. 3.

(1) What about suit against possessor of specific movable? Warren, 6 A. 354; Bouchard, 32 A. 535. See note 1 to Art. 41.

Against Whom Brought.

Art. 27. Such action can only be brought against the debtor, or the obligor, or the person who directly represents him, such as universal heirs by a universal title.

C. P. 25, 40.

Four Grounds.

Art. 28. Personal actions are grounded on one of the four causes which give rise to personal obligations. The causes are contracts, or quasi contracts, offences, or quasi offences.

R. C. C., Book III, Title III, Obligations; Title IV, Conventional Obligations (Contracts); Title V, Quasi-Contracts, Offences and Quasi-Offences.

An action brought by a third person to prevent execution of contract to build a railroad depot on property of one of the contracting parties, is a personal action. West, 115 La. 213, 38 Sou. 969.

Arising from Contracts.

Art. 29. Personal actions arise from contracts where one has bound himself for his own advantage, as by selling, purchasing, hiring or letting, or by any like contracts.

R. C. C., Book III, Title IV.

(1) The intent of this article is doubtless to declare a right of action on every valid contract when violated. To be valid, a contract must have a valuable consideration or cause. R. C. C. 1893 et seq. The consideration may consist not only in advantage to the party binding himself, as indicated in this article, but in disadvantage to the other party. The most comprehensive definition of valuable consideration is that given by the English Court in *Currie v. Misa*, L. R. 10 Exch. 162, as follows:

“A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other.” Knowlton’s *Anson on Contracts*, 2nd Am. Ed., 88; Benner, 27 A. 473.

Arising from Quasi Contracts.

Art. 30. Personal actions arise from quasi contracts, when they are grounded on the obligations imposed upon him who has managed the affairs of another without being authorized.

R. C. C., Book III, Title V, Chap. 1, Secs. 1, 2.

(1) Another action grounded on quasi-contract is that of repetition. C. P. 18; R. C. C., Book III, Title V, Chap. 1, Sec. 3.

Arising from Offences.

Art. 31. Personal actions arise from offences, as when one has become liable to another for the injury he

has inflicted on him by some crime or offence, such as theft or slander.

R. C. C., Book III, Title V, Chap. 2.
Revised Statutes, 985.

Arising from Quasi Offences.

Art. 32. Personal actions arise from quasi offences, when the ground of action is the injury done to another by one of those faults which are not considered as real crimes or offences.

R. C. C., Book III, Title V, Chap. 2.

Kinds.

Art. 33. Personal actions arising from contracts, are divided into direct and useful (sic, should be "equitable") actions.

Direct Action.

Art. 34. A direct, contradistinguished from an equitable, action, is that which arises immediately from contracts, and binds *ipso facto* all who have been parties to it.

R. C. C. 1889.

Equitable Action.

Art. 35. An equitable action is that which does not immediately arise from a contract, but from equity, in favor of a third person, not a party to it, and for whose benefit certain stipulations have been made; thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person shall pay a certain sum on his account, or give a certain thing to a third person, not a party to the

act, that third person has an equitable action against the one who has contracted the obligation, to enforce the execution of the stipulation.

R. C. C. 1890, 1902; Desforges, 135 La. 62.

(1) The stipulation pour autrui may be implied as well as express. Form is not sacramental. It is sufficient if the intention appears. Allen, 113 La. 1092, 1101 *et seq.*, 37 Sou. 980. But a third person has no right of action on a stipulation which one of the contracting parties stipulated in his own favor. *Idem.* See, generally, cases cited in opinion, p. 1102 *et seq.* Decision in *Planters'*, 52 A. 1243, holding that citizens have right of action against one with whom municipality contracted for its own benefit, overruled. *Idem.*, p. 1111. See Art. 15, No. 7.

See, also, Wright, 16 A. 125; Gillis, 16 A. 275.

(2) Third person suing can have no greater rights than one contracting had. Other party may plead all equities. Freligh, 16 A. 419.

(3) After the third party has accepted stipulation in his favor, it cannot be revoked. R. C. C. 1890, 1902; Pecquet, 17 A. 204. Nor can it be annulled without consent of both contracting parties. Bonnafé, 5 A. 225.

Another Division.

Art. 36. Certain contracts, from their nature, give rise to two species of personal actions, in favor of the contracting parties; one of these is likewise termed *direct*, in contradistinction to the other, which is termed a *contrary action*.

Direct Action Under This Head.

Art. 37. A direct action, in this acceptation, is that which arises out of a contract at the very moment of its being made, without the occurrence of any new cause since the contract; as, in the contract of loan termed *commodat*, where the action arises in favor of the owner

of the thing against him to whom he has lent it, in order to recover it.

For *commodat*, see R. C. C. 2891, 2893 et seq.

Contrary Action.

Art. 38. The contrary action is that which arises from some cause which has occurred since the contract, and has for its object the obtaining of some indemnity, such as the action which the law gives to the borrower in the loan called *commodat*, for the recovery of the disbursements which he has been obliged to make for the preservation of the thing lent to him.

For the illustration used, see R. C. C. 2908.

Each Contractor Has Right of Action.

Art. 39. It is of the essence of all synallagmatic contracts, that is to say, of those which contain reciprocal obligations between the parties, to give rise to two species of direct actions.

Thus, in the contract of sale, the purchaser has an action against the seller to compel him to deliver the thing sold, and the vendor has likewise his action against the purchaser, to compel him to pay the price.

Personal Actions Survive Against Heirs.

Art. 40. Personal actions, being attached to the person of the debtor, may be brought against all his heirs, should he die without having extinguished it; but each of them will only be liable for the amount and portion which he has inherited from the debtor's estate.

C. P. 23, 25, and notes.

R. C. C. 1422 et seq.

SECTION II.**Of the Real Action, Its Subdivisions, and the Rules Peculiar to It.****When Real Action Lies.**

Art. 41. A real action lies against him who, without having contracted any obligation towards the plaintiff, is nevertheless bound towards him, as possessor of the immovable property of which that plaintiff claims the ownership or the possession, or on which he claims to exercise some immovable right.

C. P. 4, 12.

R. C. C. 2010 et seq.

(1) It has been said that there is no reason why the same principle should not apply to movable property in the possession of another. Warren, 6 A. 354; Bouchard, 32 A. 535.

Against Whom.

Art. 42. The real action gives the right to follow the thing in whatever hands it may be found; but as relates to hypothecary actions, this rule is subject to some modifications which are established in the paragraph which treats of that action.

Hypothecary action, Art. 61 et seq.

(1) No real action would lie in Louisiana for lands situated out of the State. Edwards, 14 A. 362. But suit would lie here against a resident defendant to compel him to account for the proceeds of land sold in another State. *Id.* And, generally, our courts may act in personam against a resident defendant to compel him to act or to forbear, even though the subject-matter of the decree is property in a foreign jurisdiction. Hayden, 45 A. 362, and cases cited on p. 368 et seq.

(2) *Buildings* are immovable by nature (R. C. C. 464), whether or not they belong to the owner of the soil

on which situated, and an action for ownership or possession of such a building is a real action. Lange, 32 A. 697, 699.

(3) *Slaves*, during their existence in Louisiana, were classed as real property, and actions concerning them were regarded as real.

(4) **Kinds of Real Action:**

- (1) Petitory Action.
- (2) Possessory Action.
- (3) Hypothecary Action.
- (4) Action to Establish Title to Real Estate.
- (5) Action of Jactitation, or Slander of Title.
- (6) Action to Remove Cloud on Title.
- (7) Action for Trespass.
- (8) Action for the Ejectment of Tenants.
- (9) Action of Boundary.
- (10) Proceeding by Monition.
- (11) Proceeding to Quiet Tax Title.
- (12) Action for Expropriation.
- (13) Action for Partition of Property.
- (14) Wife's Action for Separation of Property.

Others could be added, as Revocatory Action, Action for Rescission, etc.; but they will be mentioned under Petitory Action, to which they are somewhat related. See Art. 45, note 6.

Nor are all of the above actions always real actions. Thus, the Action for Partition may be for the partition of movable as well as immovable property; and Trespass is, in the abstract, a personal action, although for damage done to real property.

The Code of Practice treats only the first three of the above, under sub-sections 1, 2 and 3. After disposing of these, we will treat those which follow, briefly, in sub-sections of our own.

§ 1.

Of the Petitory Action.

Against Whom Brought.

Art. 43. The petitory action, or one by which real property, or any immovable right to (which) such prop-

erty may be subjected, is claimed, must be brought against the person who is in the actual possession of the immovable, even if the person having the possession be only the farmer or lessee.

But if the farmer or lessee of a real estate be sued for that cause of action, he must declare to the plaintiff the name and residence of his lessor, who shall be made a party to the suit, if he reside in the State, or is represented therein, and who must defend it in the place of the tenant, who shall be discharged from the suit.

C. P. 5.

R. C. C. 2010 et seq., 2704.

(1) If the lessee, defendant, fails to comply with this article, but resists the suit himself, he will be condemned for rents, fruits and revenues, on plaintiff's establishing his title. Cutno, 127 La. 701, 705, 53 Sou. 962.

(2) Where plaintiff's property has been taken possession of and built upon by a public-service railroad, his action to recover the value of the property so taken is petitory. Lindner, 116 La. 262, 263, 40 Sou. 697.

(3) Where plaintiff sued lessee in petitory action, and owner was not made party, it was error to award plaintiff possession and reject demand for ownership, as plaintiff had no other right to possession than ownership. Byrne, 51 A. 548, 553.

(4) Where grantee sues his grantor to be decreed owner, the action has been held to be petitory, although it was declared that defendant's possession was that of plaintiff. Jaubert, 48 A. 245, 246, 248, 19 Sou. 279; Broughton, 9 R. 215; Morrison, 10 A. 542; R. C. C. 3433, 3438, 3441. See note 6, below.

(5) To make the action petitory, the petition must allege title in plaintiff, possession in defendant, and pray the plaintiff be decreed owner, or to that effect. Hood, 1 R. 109; Peck, 10 A. 161; Millaudon, 18 A. 196; Bossier's, 114 La. 710, 38 Sou. 525.

The prayer is usually held to be the determining factor as to the character of the action. Carraby, 1 R. 242; Slocomb, 21 A. 355; Edwards, 20 A. 169; Lagay, 5 R. 132.

But it has also been held that, where the allegations of the petition are clear as to the relief sought, the prayer for general relief is sufficient to make the action petitory. Haas, 125 La. 1034, 1036, 52 Sou. 149, and cases cited.

(6) The word "possession," as used in this article, should be, more properly, "occupancy." Dreux, 12 R. 489, 501. The farmer or lessee, since he holds for another, has no actual possession in himself. This explains the cases in note 4, *supra*. Therefore, in principle, a landlord could eject his tenant by a petitory action, but usually resorts to the expeditious remedy provided by Sec. 2155, R. S., as amended by Act 313, 1908, post, 74 E.

(7) The person in actual possession (custody) is the proper party to make defendant. When sued, if he possesses for or under another, he must disclose the character of his possession and name and residence of his principal, who must then be cited by plaintiff. Scott, 3 A. 637; Millaudon, 18 A. 196.

But if lessor resides out of the State, the lessee must defend the suit. Plummer, 4 R. 29. And this is true even though the principal be the United States. Dreux, 12 R. 489.

Defenses.

(8) The defendant may, of course, set up his title, and the best title will prevail. Villey, 33 A. 291; Villey, 35 A. 512; Surgi, 22 A. 20.

(9) Defendant may set up and show absolute nullities in the title of plaintiff; as:

(a) Non-observance of legal requirements in executing an order of seizure and sale. Surgi, 22 A. 20; Cronan, 27 A. 120. Or *fi. fa.* Sorel, 24 A. 262.

(b) Non-observance of legal requirements in a donation. Rowson, 51 A. 347.

(c) Assessment to one not the owner, where plaintiff sets up a tax sale. Slattery, 110 La. 98.

(d) Public sale for less than amount required by law. Thibodaux, 112 La. 906, 36 Sou. 800; Carey, 109 La. 80.

But defendant cannot set up a mere relative nullity, as the non-authorization of a wife by her husband. Cronan, 27 A. 120. Such a nullity can be taken advantage of only by those interested, as the husband, wife, or the heirs, in the case cited. Or the redemption of property adjudicated to city for taxes, after the year allowed for redemption. If the officers exceeded authority in permitting redemption, only the city can complain. Adolph, 52 A. 1156, 1160. See Leatham, 109 La. 325, 33 Sou. 354.

(10) Proof of possession by defendant is necessary where not admitted, else plaintiff will be nonsuited. Girard's, 13 A. 295; see Peck, 7 A. 71. Civil possession will suffice, Barnes, 5 R. 314.

Plaintiff Must Show Title.

Art. 44. The plaintiff in an action of revendication must make out his title, otherwise the possessor, whoever he be, shall be discharged from the demand.

(1) Latin, *vendicare*: to claim a thing as one's own. *Vendicatio*: a claim. To revendicate is to reclaim; to demand the restoration of. Webster. Smart, 109 La. 988.

(2) "It is a principle of law so familiar as to have become trite that a plaintiff in a petyory action must recover upon the strength of his own title, not upon the weakness of that of his adversary." Per Blanchard, J., in Rowson, 51 A. 350.

Therefore, plaintiff's suit falls when:

(a) His title does not describe the property with sufficient certainty. Wilfert, 131 La. 21, 58 Sou. 1019.

(b) His deed has been lost, and he cannot prove its contents with certainty. Babington, 128 La. 1066, 55 Sou. 676.

(c) His ancestor from whom he claims to have inherited had sold the property before his death. Verdun, 128 La. 1063, 1065, 55 Sou. 675.

(d) He claims by inheritance from his father, and does not prove the death of his father. Willett, 51 A. 497.

It is needless to multiply examples. Plaintiff must show a clear title free from absolute nullities. Relative nullities are no bar to plaintiff, unless defendant is the person directly interested in raising them. See note (9) to last article.

Defendant can stand upon his possession alone until Plaintiff makes out a good title. R. C. C. 3454, 1.

Until plaintiff shows a good title, free from absolute nullities, defendant need make no defense. Landry, 45 A. 1114; Willett, 51 A. 486; Rowson, 51 A. 351.

And a better title in a third person defeats plaintiff's suit. Rowson, 51 A. 350, and cases cited. With the restriction, however, that, if plaintiff's title is subject only to a relative nullity in favor of a third person, it prevails as against the defendant. Adolphe, 52 A. 1156; West, 52 A. 381; Font, 46 A. 215, 14 Sou. 522.

In a proper case, the judgment may be nonsuit. Willett, 51 A. 494.

It is frequently stated that, "as against a trespasser, the plaintiff in a petitory action is not bound to show a title perfect against the world." Stille, 41 A. 816, 6 Sou. 634; Vicksburg, 41 A. 896, 6 Sou. 725; Zeringue, 15 A. 76. An examination of these and other decisions will show that this statement means nothing more than has been stated in preceding portions of this note—viz., that failure to show a good title, free from absolute nullities, will defeat plaintiff's suit; while mere relative nullities will not defeat plaintiff's title, unless urged by those who have a right to urge them. A trespasser has as much right to remain in possession as anyone else, as far as the petitory action is concerned, until plaintiff exhibits a good title.

It is, perhaps, true that, where defendant in possession sets up no title at all, plaintiff need only show an apparently valid title antedating the possession. Young, 15 A. 454; Patterson, 23 A. 274.

Anticipating Defenses.

(3) In a petitory action, plaintiff has a legal right to attack whatever adverse title is set up by the defendant in his answer, without filing additional pleadings. C. P. 329; Hickman, 33 A. 438; Telle, 34 A. 1243; Willis, 108

La. 255; McMaster, 11 A. 547; Bledsoe, 38 A. 618; Thompson, 47 A. 51; Remick, 47 A. 923; Maillot, 11 A. 467; Britt, 126 La. 159; Abshire, 133 La. 254, 62 Sou. 667.

And in drawing his petition plaintiff is not bound to anticipate what title defendant may set up. Thompson, 47 A. 49. But plaintiff often acts at his risk in such a matter. For example, if his title has been apparently divested by a judgment, if that judgment is absolutely null, he can either ignore it or simply allege that it is a nullity; but, if the judgment is only relatively null, it has to be set aside by a proper suit. Plaintiff, therefore, might be cast unless he combined his petyory action with an action for nullity of the judgment and made all necessary parties to the latter action. Callahan, 47 A. 427; Dauterive, 46 A. 1316; Beland, 46 A. 326; Ford, 46 A. 332. It is in deciding that the judicial proceedings are absolutely void, and acting accordingly, that the risk comes in, for the Court might hold that they are not absolutely null. Bankston, 117 La. 1054, 1065; Jewell, 110 La. 820. What has been said applies equally to tax sales by which plaintiff's title has been apparently divested. Mays, 46 A. 1475, 16 Sou. 478.

Evidence Required.

(4) When either party relies upon a Sheriff's sale as a link in his chain of title, he must show, not only the Sheriff's deed, but also the judgment (of a competent Court) and writ of execution under which the sale was made. Fontelieu, 116 La. 866, 41 Sou. 120; reasons given, p. 886; cases cited, p. 887.

(5) A mere act of partition is not evidence of title. The title of the partitioners must be shown. Brown, 15 A. 169. And a deed from the State for property adjudicated to it for taxes is not sufficient. The State's title must be shown. Gatlin, 36 A. 350; Wilbert, 42 A. 856; Breaux, 43 A. 433.

(6) The petyory action may be coupled with an action for partition. Durbridge, 43 A. 504.

Estoppel to Dispute Title.

(7) Where the parties trace their titles to the same source, neither can dispute the title of the common au-

thor. Pecot, 117 La. 765, 42 Sou. 263; Clemens, 44 A. 393. Nor can a party dispute the title of his own author. Keating, 119 La. 462; Harang, 34 A. 634; Girault, 15 A. 684.

Incidental Demands by Plaintiff.

(8) Plaintiff in petitory action may couple with his demand for restitution of the property a demand for the fruits, issues, rents, profits and revenues which have been appropriated by the defendant in possession. R. C. C. 502; Jewell, 110 La. 820.

But if defendant's possession was in good faith, he only owes the revenues from judicial demand. Blair, 110 La. 338; R. C. C. 3453, 503; Pecot, 117 La. 776; Durbridge, 44 A. 74, 10 Sou. 402; Dufilho, 27 A. 398. And, although the possession began in good faith, the possessor will owe the revenues from the time the defects in his title became known to him. Montgomery, 41 A. 649, 656, 6 Sou. 224. Therefore, Art. 3482, R. C. C., does not affect this question.

See, also, cases cited in next note.

Incidental Demands by Defendant.

(9) The evicted possessor in good faith is entitled to recover his expenses, and for improvements to the land, and may retain it until reimbursed. R. C. C. 2453; Beard, 46 A. 877; Hutchinson, 38 A. 150; Oriol, 38 A. 770; Foster, 117 La. 217, 41 Sou. 551. As to rights of possessor in bad faith, in this respect, see R. C. C. 508; Schwenck, 52 A. 240; Jewell, 110 La. 811; R. C. C. 2314; Scott, 42 A. 770; Wood, 33 A. 751.

See notes to next article.

(10) The plaintiff must make out *his* title. Therefore, the petitory action cannot be brought by an administrator. Caze, 14 A. 232. Nor by warrantor. Kelly, 14 A. 661. Contra, Caze case; Gordon, 26 A. 366.

See notes to next act.

Who, Besides Absolute Owner, May Bring.

Art. 45. The petitory action may be brought by one who has the ownership only of an undivided part of an

estate, or of a real right to which such an estate is subjected, though his ownership may be limited to a certain period, or end by the occurrence of a certain event.

(1) Where one has bought a tract of land with the stipulation to reconvey it to the vendor as soon as he (the vendee) has removed the timber therefrom, or, at all events, at the end of fifty years, he has such an ownership as to entitle him to maintain the petytory action. Ruddock, 111 La. 1019, 36 Sou. 105. A promise to sell will support the petytory action where plaintiff is entitled to execution of promise. Whited, 122 La. 101, 47 Sou. 415.

(2) A joint owner may, as against a possessor without title, recover, not only his undivided share, but the whole property. Gordon, 26 A. 367; Compton, 3 La. 128, 22 Am. Dec. 167; Mays, 46 A. 1483; Richardson, 120 La. 223, 45 Sou. 111. See note 28 to Art. 15, ante.

(3) Plaintiff cannot offer a title acquired since the institution of his suit. Britt, 126 La. 156, 159, 52 Sou. 251; Dugas, 15 A. 116. Judgment will be nonsuit. Idem. The proper parties must be before the court from beginning to end. Union, 46 A. 636.

Plaintiff must declare upon all the titles he holds at commencement of suit. If he withhold a title, and afterwards sue upon it, *res adjudicata* will be maintained against him. Hargrave, 109 La. 533, 535, 33 Sou. 590; Shaffer, 14 A. 575; Hart, 25 A. 585; Heroman, 34 A. 815; Howcott, 106 La. 530, 532. And so with defendant. Linqvist, 112 La. 1031, 36 Sou. 843.

(4) A party who has recognized the title of another is estopped to dispute it, and his vendee is likewise estopped. Girault, 15 A. 684. Also his heirs. McGuire, 40 A. 582. And so a lessee cannot dispute his landlord's title. Paquetel, 17 A. 63; Tippet, 10 La. 359; Le Breton, 2 R. 462; Campbell, 118 La. 881, and cases cited. But this estoppel does not continue after the expiration of the lease. Burbank, 30 A. 489; 118 La. 881.

(5) **Creditor's Action in Nature of Petytory Action.**

Under this article it is proper to discuss the action to which we give the above title.

It is the action which a creditor, or the representative

of all the creditors, has to pursue the property of his debtor in third hands, and to have it decreed to be the property of the debtor in order that it may be subjected to plaintiff's debt.

Such a creditor can assert all the rights of his debtor in the property, and the action is governed by the rules of the petitory action. The right of action is necessary, for without it the creditor would be at the mercy of his debtor, who might refuse or be unable to bring the suit himself. Spencer, 33 A. 898, 906; Moresi, 115 La. 796; Belcher, 114 La. 640, 38 Sou. 481; Forstall, 34 A. 775; Jack, 34 A. 740.

The action is neither hypothecary nor revocatory, in the technical meaning of those words under the Codes. It is to restore the property to the estate of the debtor only *quoad plaintiff's rights*. Logan, 30 A. 727, 730, 733, 734; Villey, 33 A. 291; Gogreve, 41 A. 244.

In all the cited cases, except the Gogreve case, plaintiff was a mortgage or judgment creditor; but the principle is the same whether plaintiff is an ordinary, judgment or secured creditor. The time he became a creditor makes no difference. Belcher, 114 La. 611. To what extent the debt must be liquidated before plaintiff can proceed against property in third hands has not been decided. See note 26 to Art. 15.

Other Actions Related to Petitory.

(6) For the Revocatory Action, see R. C. C., Book III, Title IV, Sec. 7, Art. 1968 et seq.

Action for lesion and rescission of sales thereby, etc., see R. C. C. 1860 et seq.; 2589 et seq.; 1398 et seq.

And for actions for Nullity, Rescission, Dissolution, Declaration de Simulation, etc., see the Civil Code.

The actions referred to in this note partake of the nature of petitory actions, in that the ownership of immovable property is (most often) involved. Some of them are often cumulated with and form the basis of the petitory action, but the discussion of them and the principles involved belongs to a work upon the Civil Code.

§ 2.

Of the Possessory Action, and of the Rules Which Govern It.

Who May Bring.

Art. 46. The Possessory Action, which is a branch of real actions, may be brought by any possessor of a real estate, or of a real right who is disturbed either in the possession of the estate or in the enjoyment of the right, against him who causes the disturbance, in order to be maintained in, or restored to the possession, whether he has been evicted or disturbed; provided his possession be accompanied by the qualifications hereafter required.

C. P. 6.

R. C. C. 2010 et seq.

(1) In the possessory action, even more than in the petitory, it is the prayer of the petition which makes the action possessory. The action takes its character from the relief prayed for. The plaintiff may set out his full title to the property, but if he prays only to be restored to, or quieted in, his possession, his action is possessory only. The allegations of title are construed simply as showing the nature, character and extent of possession. Williams, 41 A. 702, 6 Sou. 604; Houssiere, 115 La. 112; Hermitage, 46 A. 425, 430. Nothing can be inquired into except the possession and the rights thereunder. Do.; Huyghe, 37 A. 240; Kemper's, 16 La. 44. But of course prayer must be preceded by necessary allegations. Haas, 125 La. 1036.

(2) The jurisdictional amount is the value of the possession or of the possessory rights in controversy, not the value of the property. Baptist Church, 52 A. 704; Newell, 50 A. 162.

Possession Must Be as Owner of Property or of Real Right.

Art. 47. The possessors entitled to bring these actions are those who possess as owners.

Persons entitled to the usufruct or to the use of a real

estate, and others having real rights growing from such real estate, may also bring their action, when disturbed in the enjoyment of their rights.

(1) The subject-matter of the possessory action may be the possession of real estate, or of any real right or servitude in real estate. Usufruct, R. C. C. 533 et seq. Use, R. C. C. 626. Habitation, R. C. C. 627. Servitudes, R. C. C., Book II, Title IV. Real obligations, R. C. C. 2010 et seq.

(2) The writer's opinion is that the requirement that plaintiff possess as owner only means that he must possess for himself, and not for another. It only states the opposite of what is provided in the next article. Plaintiff's possession must not be a precarious possession. R. C. C. 3556, No. 25.

The language of the Supreme Court in *Grant*, 131 La. column 868, and in *Mott*, 116 La. 632, goes too far in this respect. It implies that the possessor must have a title, whereas the clear law and jurisprudence is that a mere trespasser, without a shadow of title or right to ownership, who has maintained himself in possession for a year, can vindicate that possession by the possessory action. The only right he has to show is "*possideo quia possideo*." I possess because I possess. Such a claim is necessarily as owner, but it may be that of an absolute usurper, and succeed. R. C. C. 3450, 3454, 3455; *Smith*, 130 La. 472, 58 Sou. 153; *Mott*, 116 La. 632. The question of ownership cannot be inquired into at all. Same cases; cases cited under preceding article; *Litchworth*, 4 N. S. 71; *LeBlanc*, 2 A. 223; *Daigre*, 48 A. 414, 417; *Gardiner*, 14 A. 732; *Peytavin*, 6 La. 553; *Yarborough*, 7 La. 153; *McCutcheon*, 14 A. 34. If the ownership cannot be inquired into, it is folly to say that the possessor must show or have a title. C. P. 49; R. C. C. 3434, 3435, 3455.

Possession is a fact, and not a right. *Chinn*, 6 A. 66.

Precarious Possessors; Their Rights.

Art. 48. Those who possess in the name of another, such as tenants, are not entitled to the possessory action, when disturbed in the enjoyment of the real estate which

they possess in that quality, or even when they are expelled; but they have their remedy against the person in whose name they possess, and they are bound to apprise him of the disturbance they have experienced, by personal notice, if he be within the State, and by advertisements in the newspapers, if he be out of the State in order that he may quiet them if it can be done; otherwise they lose all right to claim damages from him, and will be liable to him besides for all the loss and damages which he may have sustained through their neglect.

R. C. C. 2696, 2724, 2704, 3433, 3438, 3441; Fox, 31 A. 67, 71; Pierse, 2 A. 357; Dooley, 32 A. 192; Sallabah, 34 A. 1053, 1054.

Requirements.

Art. 49. In order that the possessor of a real estate, or one who claims a right to which such estate may be subjected, may be entitled to bring a possessory action, it is required:

Actual Possession.

49-1. That he should have had the real and actual possession of the property at the instance (sic, should be instant) when the disturbance occurred; a mere civil or legal possession is not sufficient.

(1) For Possession and its kinds, see R. C. C. 3426 et seq.

(2) Payment of taxes, and having someone look after the land or watch for trespassers, is not actual possession. Crowell, 130 La. 842. Nor the tracing of boundary lines, nor the marking of trees. There must be corporeal detention and use of the thing according to its nature and destination, and swamp lands or timber lands are no exception to this rule. The possession must be visible, open and public, as occupying a house, cultivating ground, constructing roads or canals, deadening, felling or removing trees. R. C. C. 3428; Hanson, 126 La. 347, 52 Sou. 537; South, 119 La. 199; Chamberlain, 48 A. 587, 19 Sou. 574;

Miller, 134 La. 662, 665. But isolated acts at long intervals, as occasional cutting of a few trees, will not suffice. Frederick, 120 La. 787, 788; Lacroix, 133 La. 227, 234. Continued grazing of cattle on pasture lands is sufficient. Chamberlain, 48 A. 590.

(3) **The "Civil or Legal" Possession** referred to in this clause is that defined by R. C. C. 3431: that which is supposed to flow from the acquisition of a valid title, without any *corporeal* detention by the owner or his authors at any time. This possession is a mere fiction; in fact, no possession whatever; and it is sometimes difficult to see why the term was ever introduced into our law. It serves but to confuse. Mr. Justice Blanchard seems to refer to this fictitious possession when he says, in Ashley, 109 La. 654: "Civil possession will support the possessory action." The observations of the learned Justice in this case, in so far as they concern the possessory action, are obiter dicta, and are in conflict with our law and jurisprudence. The learned Justice cites Ellis vs. Prevost, 13 La. 230. But he overlooks the fact that in Ellis vs. Prevost, 19 La. 253 et seq., the Supreme Court absolutely overrules the principles laid down in the first case, and declares the law as it has remained ever since, and as stated in the next note hereto. He also cites Handlin vs. Lumber Co., 47 A. 401; but this also merely declares the law as in note 4.

(4) It is well established that **Civil Possession** will support the possessory action, but it is of the kind illustrated by Art. 3429 of the R. C. C. It must have been preceded by actual *corporeal* possession, either by the plaintiff himself or by one or more of his authors in title. Handlin, 47 A. 401, 16 Sou. 955; Sallier, 113 La. 400, 403, 37 Sou. 6; Jones, 115 La. 926, 927, 40 Sou. 357; Ellis, 19 La. 251; Davis, 2 A. 205; Sears, 5 A. 690; Searles, 12 A. 203; Taylor, 45 A. 124, 12 Sou. 118; Hanson, 126 La. 347, 52 Sou. 537; Miller, 134 La. 662, 666.

(5) **Proof of Title, Effect of.** While it is true that the title cannot be inquired into in a possessory action, yet proof of plaintiff's title is admissible, and becomes of the utmost importance, to show the extent of possession. R. C. C. 3437, 3498.

The possessor without title takes possession, inch by inch, only of such land as he reduces to actual physical possession, as by erecting structures thereon, actual cultivation, clearing, or like acts. He can only extend the possession acquired by such acts by enclosures, such as fences or permanent ditches. The enclosures may suffice alone where the intention to take possession of the land included is manifest. *Railway Co.*, 52 A. 197; *Ellis*, 19 La. 251, 257; *Taylor*, 45 A. 126; *Crowell*, 130 La. 843; *Hanson*, 130 La. 772, 776, 58 Sou. 567; *Moore*, 126 La. 887 et seq.; *Gray*, 131 La. 925.

On the contrary, the possessor who goes into possession under a title need do nothing but take actual possession of a small part of the land. Such actual possession extends to the full limits of his title, and he needs only to show his title and actual possession of a part, to show actual possession of the whole. *Jones*, 115 La. 926; *Sal-lier*, 113 La. 403; *Levy*, 112 La. 789; *Railsback*, 118 La. 925; *George*, 109 La. 825, 833; *Mott*, 116 La. 629; *Green*, 37 A. 752; *Moore*, 126 La. 888 et seq.

And it makes no difference regarding such possession under title that smaller tracts composing collectively a larger tract were acquired at different times, from different vendors, and by different deeds. All that is required is that the tracts form one body of land, and possession of the smallest part of any one tract will be possession of the whole body of land. *Green*, 37 A. 752; *Railsback*, 118 La. 916, 925; *George*, 109 La. 825, 833; *Jones*, 115 La. 926; *Gilliard*, 1 R. 159, 163; *McDonough*, 15 La. 556, 561. And this seems to be the doctrine in other jurisdictions. *Rich*, 158 U. S. 375, 39 L. Ed. 1022, 15 Sup. Ct. 1006, at p. 1009, and cases cited; *A. & E. Ency. of Law* (2nd Ed.), Vol. 1, p. 865; *Hole*, 25 Pa. St. (1 Casey) 491; *Alston*, 2 Speer (S. C.) 450; *Sharp*, 100 Va. 27, 33, 40 S. E. 105; *Boyce*, 2 Dana (Ky.), 127; *Garrett*, 26 W. Va. 370; *Hutchinson on Land Titles*, p. 229. And so where one in possession of a tract of land under title acquires title to an unoccupied tract adjoining the first tract, his possession at once extends to and covers the second tract without any physical act of possession thereon. *Nothrup's Trustee*, 116 S. W. 699; *Overton*, 111 S. W. 369, 32 Ky. Law Rep. 931; *Green*, 37 A. 753.

It is almost needless to add that, where one acquires

two entirely separate tracts, not adjoining, by the same deed, a taking possession of one of the tracts will not extend to the other tract.

In order for the possession of part to extend to the whole tract embraced in one's title, it is not necessary that the title be recorded. *Bernstine*, 118 La. 1098, 1100, 43 Sou. 889. But the possessor who does not record his title is liable to have his possession of the part not actually occupied ousted by a third person who acquires a title to the property, or any part thereof, and goes into actual possession of a part of what he has acquired. *Moore*, 126 La. 887 et seq.

The Same—Continued.

(6) It making not the least difference for the purposes of the possessory action whether plaintiff's possession is in good or bad faith, it would seem that to show extent of possession as treated in the foregoing note is the only purpose for which proof of title becomes important in a possessory action; but under the decisions it seems that proof of title will assist either party in showing his own possession or in repelling the possession of his adversary. Lighter acts will amount to actual possession when done under a title than when done without title; and more pronounced acts are required when there is an existing adverse possession to oust. *Michel*, 48 A. 341, 346, 19 Sou. 215; *Lecompte*, 19 La. 484, 489; *South*, 119 La. 199; *Baker*, 11 La. 439.

Possession Undisturbed for One Year; Exception.

49-2. That he should have had that possession quietly and without interruption, by virtue of one of the titles prescribed in the 47th Article, for more than a year previous to his being disturbed; provided the possession of less than one year be sufficient, in case the possessor should have been evicted by force or by fraud.

R. C. C. 3454. See notes to C. P. 47, and see last paragraph of this article.

(1) Plaintiff must have possessed for one year prior to the disturbance or eviction complained of. *Young*, 34

A. 385; Dickson, 10 A. 518; Crowell, 130 La. 837, 841, 58 Sou. 590; Thompson, 47 A. 51; Garland, 117 La. 346; Foreman, 135 La. 221, 223.

Unless evicted by force or fraud. Dickson, 10 A. 518; Cameron, 48 A. 1346, 20 Sou. 710.

(2) It seems that if plaintiff in a petitory action, after obtaining a judgment against defendant, suffers the defendant to remain in possession for a year, defendant will acquire a new right to possession. Vigo, 48 A. 667.

A Real Disturbance.

49-3. That he should have suffered a real disturbance either in fact or in law.

C. P. 50, 51, 52, 53.

Suit Within One Year from Disturbance.

49-4. That he should have brought his suit, at the latest, within the year in which the disturbance took place.

C. P. 59.

R. C. C. 3456, 3536.

Taylor, 45 A. 124, 126, 12 Sou. 118; Crowell, 130 La. 840; Garland, 117 La. 346.

Neither Title Nor Good Faith Necessary.

When the possession of plaintiff is accompanied with all of those circumstances, it matters not whether he possesses in good or in bad faith, or even as a usurper, he shall nevertheless be entitled to his possessory action.

R. C. C. 3450, 3451, 3452, 3453, 3454, 3449.

See note (2) to Art. 47.

Crowell, 130 La. 841; Smith, 130 La. 472, 476, 58 Sou. 153; Grant, 131 La. 865, 60 Sou. 374.

The Disturbance.

Art. 50. The disturbance which gives rise to the possessory action may be of two kinds; disturbance in fact, or disturbance in law.

(1) As a matter of course, if there is no disturbance, there is no cause of action, and plaintiff's suit will be dismissed.

Disturbance in Fact.

Art. 51. Disturbance in fact occurs when one, by any act, prevents the possessor of a real estate, or of a right growing from such an estate, enjoying the same quietly, or throws any obstacle in the way of that enjoyment, or evicts him through violence, or otherwise.

Almost any possessory action to which we might turn in the reports would afford an example of a disturbance in fact. For example, White, 32 A. 130, 133.

Disturbance in Law.

Art. 52. Disturbance in law takes place when one, pretending to be the possessor of a real estate, says that he is disturbed by the real possessor, and brings against the latter the possessory action; for in such a case the true possessor is disturbed by this action, and may also bring a possessory action, in order to be quieted in his possession.

(1) But the defendant in possession is not obliged to bring a new action. He may simply defend the suit brought, and, if he shows possession, will be maintained in it. Crowell, 130 La. 840, 843; Jennings, 116 La. 1058. Plaintiff must show possession or his suit falls. Art. 49. There is no stronger way to repel plaintiff's pretensions than to prove actual adverse possession in the defendant or in any other person.

But in no case shall the mere demand in revendication of a real estate, or of a real right, be considered as a disturbance in the enjoyment of a possessor, and entitle him to bring a possessory action.

It is the bringing of the *possessory* action *only* which amounts to a disturbance in law.

Proof Required.

Art. 53. The plaintiff in a possessory action needs only, in order to make out his case, to prove that he was in possession of the property in question, in the manner required by this Code, and that he has either been disturbed or evicted within the year previous to his suit.

C. P. 49.

Proof Excluded.

So that when the possession of the Plaintiff, or the act of disturbing him is denied, no testimony shall be admitted, except as to the fact of the possession, or as to the act of disturbance, and all testimony relative to property shall be rejected.

R. C. C. 3455.

(1) It is evident under this article that when defendant does not deny either plaintiff's possession or the fact of disturbance, plaintiff will be entitled to judgment without offering evidence.

(2) Defendant cannot attack plaintiff's title, nor establish his own title. Either party may offer his title to show and support his possession, but such evidence will be limited to the question of possession. Frazier, 21 A. 541, 542; Huyghe, 38 A. 836; Young, 34 A. 386; Chaffe, 26 A. 685; St. Amand, 25 A. 164; Lott, 21 A. 559; Chinn, 6 A. 66; Garland, 117 La. 346, 348, 41 Sou. 644; Grant, 131 La. 865, 60 Sou. 374; Smith, 130 La. 472, 475, 58 Sou. 153; Houssiere, 115 La. 124; see note 2 to Art. 47; Producers', 132 La. 691, 61 Sou. 754.

Petitory Action Excludes Possessory.

Art. 54. If the possessor who has been disturbed in or evicted from his possession, bring a petitory action, that is to say, claim the ownership of the property, he

shall not afterwards be entitled to the possessory, by dismissing the petitory action.

Naturally, since in his petitory action he judicially admitted defendant's possession. Williams', 117 La. 601, 618.

The same rule shall govern, if he sue at the same time for the possession and the ownership of the property; he shall then be considered as having renounced the possessory in order to resort to the petitory action.

C. P. 150; Mouton, 130 La. 299, 301, 57 Sou. 934.

No Cumulation of Petitory with Possessory.

Art. 55. Petitory and Possessory actions shall not be cumulated or joined together, except by consent of parties.

Therefore, he who is sued in a possessory action cannot bring a petitory action, until after judgment shall have been rendered in the possessory action, and until, if he has been condemned, he shall have satisfied the judgment given against him.

(1) Where plaintiff joins the two actions in the same petition, his action is petitory, under Art. 54.

(2) Where plaintiff brings the petitory action, he cannot afterwards change to possessory. Art. 54.

(3) Where plaintiff brings the possessory action:

"A plaintiff may, of course, at any time convert his possessory action into a petitory action by dismissing the one suit and instituting another; but he cannot, after issue joined, operate this change by supplemental petition, unless with the consent of defendant. It would be changing the issue." Provosty, J., in Crowell, 130 La. 842.

It would, therefore, seem that, *before issue joined*, plaintiff may, by supplemental petition, make the action petitory. The two petitions would stand as one, and the

rule of Art. 54 apply. But it would certainly tend to a clearing of issues if he dismissed his possessory action and brought a petitory. See *St. Amand*, 25 A. 166.

(4) It is permitted to the defendant at no time to change the issue from possessory to petitory without the consent of plaintiff. He must wait until the judgment in the possessory action has become final; and, if he is condemned, he must satisfy the judgment before bringing a petitory action. This rule is so far carried that the defendant in a possessory action, who is the real and legal owner, must pay the plaintiff in possession damages for cutting and removing his own timber from land in plaintiff's possession before he can bring the petitory action. This subject will be further treated under the head of "Action for Trespass," post, 74D, 3. See *Grant*, 131 La. 865, 60 Sou. 374; *Gray*, 131 La. 924, 925; *Smith*, 130 La. 475, 476; *Houssiere*, 115 La. 124; *Ex rel. Jennings*, 113 La. 575; Art. 57.

(5) Where plaintiff cumulates petitory, possessory and slander of title in the same petition, he will be dismissed on failure to elect. *Davidson*, 126 La. 540, 52 Sou. 758. Query: If only petitory and possessory had been cumulated, would not the action have been petitory, under Art. 54? See note 2 to Art. 150.

(6) But the parties have the right by consent to inject into the suit any issue bearing upon the ultimate result, and possessory may be changed to petitory by consent; but issues beyond possessory issues will be considered only to the extent of consent. *Houssiere*, 115 La. 125.

(7) But the bringing of a petitory action, by the defendant, in contravention of this article, does not amount to an acquiescence in the judgment rendered in the possessory action entitling plaintiff to dismissal of pending appeal. *Vigo*, 48 A. 666, 19 Sou. 682.

Id., When Settlement of Possessory Judgment Requires Delay.

Art. 56. Nevertheless, if the judgment rendered in a possessory action require a settlement, which may occasion delay, then the judge shall fix a term for making

such settlement, at the end of which the petitory action may be brought.

Possessory May Be Merged Into Petitory by Consent.

Art. 57. If the plaintiff in a possessory action consent that it be cumulated with the petitory action, he shall be considered as having renounced the possessory action, and the judgment shall decide only the question of ownership.

See Art. 55, and note 6 thereto; Art. 150; Lindner, 116 La. 263, 40 Sou. 697.

Sequestration of Res; When.

Art. 58. When each of the parties, in a possessory action, alleges that he has the possession of the property, and both of them bring suit on the allegation of having been disturbed in their possession, if the fact of the possession be doubtful and uncertain, the judge shall maintain in possession the one of the parties who shall appear to him to have the most apparent possession, or he may, at the request of one of the parties, order the sequestration of the property until the question of ownership shall have been decided.

R. C. C. 2979 et seq.; C. P. 275, 1, 3.

(1) This is an article of difficult interpretation. Does it apply only where both parties have brought possessory actions, each against the other, and the suits are being tried together? Or does it also apply to a case where defendant in his answer alleges possession in himself and the other requisites of a petition in a possessory action, and prays to be quieted in his possession? The writer believes that it applies to either case.

Certainly neither party could be maintained in possession unless he established all the requisites of Sec. 49. Then, what is meant by the words, "if the fact of posses-

sion be doubtful and uncertain"? The requisites of the possessory action must be established with sufficient certainty to entitle either party to a judgment. If neither establish them, then both should be dismissed.

This article cannot mean that the Court should slacken the rule as to the possession required. The article is perhaps intended to apply to a case where both parties have done acts of actual possession sufficient to give either the possession as against any third person, but so interlaced and interspersed that between the two it is difficult to determine which has possession. It is not strange that this article has not been, in this respect, judicially interpreted.

There is no doubt that the article is intended to direct the action of the Judge after trial and on rendering judgment, and is not intended to provide any conservatory measures pending the decision of the possessory action or actions. Such conservatory measures are provided in a later chapter.

A sequestration issued during the pendency of a possessory action, and ancillary thereto, cannot be continued, after the end of the possessory action, to await the decision of the question of ownership. A sequestration is in every case ancillary to a pending suit, in aid of a precise demand made in that suit. It is incident to this demand; and, unless the demand exists, there is nothing to support the sequestration. Platz, 122 La. 27.

Sequestration issued in a possessory action ends with that action. Crowell, 130 La. 837, 841, 58 Sou. 590; La-barre, 133 La. 854, 861, 63 Sou. 380, 382.

The remedy is a new suit, and a new sequestration in it. Martel, 115 La. 451, 455, 30 Sou. 441.

Sequestration issued in a possessory action cannot be maintained until the question of ownership is decided, because the ownership cannot be raised or decided in a possessory action. Jennings, 117 La. 961, 42 Sou. 467.

If there is any peculiar or different species of sequestration provided by this article from those provided for in the chapter on sequestration (post, Art. 269 et seq.), it has never been used or resorted to. The Supreme Court misapplied this article in *State vs. Debaillon*, 113 La. 635, as is conclusively shown in the subsequent adjudications upon the same matter. Jennings, 117 La. 966, 967; 116

La. 1057, 1058. As well as in the prior opinion directing the continuance of the sequestration. *State vs. Debaillon*, 113 La. 573.

This article doubtless contemplates that a petitory action will immediately follow the judgment of the Court refusing to maintain either party in possession, and doubtless means that, incidental to such petitory action, sequestration of the property may be ordered. The party in the best position to do so would doubtless take immediate corporeal possession after the judgment declaring neither party in possession, thus forcing the other party to the petitory action. This is the only view under which this article can be reconciled with the other law and the jurisprudence.

Action Prescribed by One Year.

Art. 59. If one who is disturbed in or evicted from his possession, suffer a year to elapse without bringing a possessory action, that action shall be prescribed, and he must then resort to a petitory action.

See annotation to Art. 49, No. 4.

Possessory Action Not Allowed for Personal Property.

Art. 60. Possessory actions cannot be maintained for personal property, the action in revendication for that species of property having nothing in common with the extraordinary privileges secured to the owners of real estate, or of real rights, when they are disturbed in their enjoyment.

(1) Slaves were real estate and subjects of possessory action under old Code, Art. 46.

(2) Buildings are immovable by nature (R. C. C. 464), and are subject to the possessory action, whether on the land of the owner or not. *Lange*, 32 A. 697.

(3) Trees, until actually cut down, are also immovable property. R. C. C. 465. Whether belonging to the owner of the soil or not. *Act 188, 1904*, p. 420.

§ 3.

Of the Hypothecary Action and of Its Rules.**Definition.**

Art. 61. An hypothecary action is a real action, which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt.

R. C. C. 3397 to 3410, inclusive; 1421; 1433 to 1443, inclusive.

(1) The hypothecary action is a proceeding in rem or ad rem. Labauve, 31 A. 141; Wisdom, 31 A. 61; Thompson, 42 A. 126. The action, therefore, being brought against real property, and directed against the specific property hypothecated, rather than against the person of the debtor, is always a real action. The writer believes that the Supreme Court in the Wisdom case, *supra*, at p. 60, placed a wrong construction on C. P., Art. 12, in holding that, when executory process is directed against the property in the hands of the original debtor or his succession, it is not a real action. We believe that the proper construction to put upon Art. 12 is that, if the creditor proceed via ordinaria to secure a personal judgment against his debtor, the action is personal, even though he seeks also to have the personal judgment secured by recognition of the mortgage previously given. This is as far as Art. 12 goes, and is the only way to reconcile it with the clear provisions of this Code. Any action which proceeds directly against real property, as when the creditor proceeds via executiva, is a real action, even though the debtor or the holder of the property be given the alternative to pay the debt and keep the property. See Art. 62.

(2) To support the hypothecary action, there must have been an actual hypothecation or mortgage of the property to secure a debt, or a privilege existing according to law.

The most usual hypothecation is the ordinary conventional mortgage. To this class might also belong the

contract in the form of a sale, but clearly intended as security merely. *Howe*, 40 A. 307.

The hypothecation may also be a judgment, which, when properly recorded, becomes a judicial mortgage. *Gallaugh*, 35 A. 829; *Baker*, 107 La. 490; *Givanovitch*, 36 A. 272. See note 11 to Art. 68.

It may also be by the effect of law, as the minor's mortgage against the tutor. *Skipwith*, 34 A. 28; *Schneider*, 45 A. 881; *Lyman*, 47 A. 73; see note 12 to Art. 68. Wife's mortgage against husband. *Gale*, 7 A. 140; *Jumonville*, 27 A. 461; *Securities Co.*, 49 A. 1394. Other legal mortgages provided for by Civil Code, Arts. 3311 to 3320. 3271, 3272, 3273, 3274, 3275; C. P. 709; see note 13 to Art. 68.

Follows the Property.

Art. 62. The hypothecary action, like all real actions, follows the property to which it is attached, in whatever hand it may be found, but it is subject to different rules, according as the property may be in the possession of the debtor, or of his heirs, or of third persons.

R. C. C. 3399.

(A) WHEN PROPERTY IN POSSESSION OF DEBTOR.

(a) When Creditor Has Executory Title.

Art. 63. When the hypothecated property is in the hand of the debtor, and when the creditor, besides his hypothecary right, has against his debtor a title importing a confession of judgment, he shall be entitled to have the hypothecated property seized immediately and sold for the payment of his debt, including the capital, the interest, and the costs, pursuant to the rules provided hereafter for Executory proceedings.

For "Executory Proceedings," see Art. 732 et seq.

For definition of "Title Importing Confession of Judgment," or "Executory Title," see Art. 733.

Pact de Non Alienando.

(1) When the act of mortgage in authentic form contains the agreement by the mortgagor that he will not alienate the property to the prejudice of the act of mortgage, usually called the "pact de non alienando," the mortgagee may still proceed by executory process and seize the property in whosever hands it may be, without notice to anyone except the mortgagor or his succession. Donaldson, 1 La. 39, 40; Nicolet's, 13 La. 313; Lawrence, 15 La. 267; Haley, 10 R. 54; Barrow, 2 A. 453; Stanbrough, 4 A. 324; Guesnard, 8 A. 58; Smith, 13 A. 241; Mayer, 35 A. 60; Bienvenu, 33 A. 217; Dodd, 6 R. 60; Murphy, 33 A. 464; Bullier, 23 A. 339; Stevens, 26 A. 617; Bank, 44 A. 199, 10 Sou. 779; Dodds, 45 A. 288, 12 Sou. 345; Truxillo, 47 A. 10, 16 Sou. 642; Huber, 111 La. 758. See notes to Art. 68.

(b) When Creditor Has No Executory Title.

Art. 64. If the creditor has no executory title against his debtor, and the latter be in possession of the hypothecated property, the former can only seize and sell such property, after having obtained judgment against the debtor in the usual form.

(1) Having no executory title, he must proceed against the debtor personally to have his hypothecation recognized and made executory. This is not a real action. C. P. 12; note 1 to Art. 61. Therefore, this article is inserted here, under Real Actions, for clearness, and because the mention here is natural and explanatory.

(B) WHEN PROPERTY IN POSSESSION OF DEBTOR'S HEIRS.

(a) When in Possession of a Single Heir.

Art. 65. If the debtor has died leaving a single heir who has accepted the succession, the hypothecary cred-

itor may act against that heir, in the same manner as he would have done against the debtor himself, that is to say, either by pursuing the executory or the ordinary mode of proceeding, according to the tenor of the hypothecary act.

C. P. 734.

R. C. C. 1417, 1418, 1421, 1433 et seq.

(b) When There Are Several Heirs.

Art. 66. If, on the contrary, the deceased debtor leave several heirs, and they have accepted the succession, in such a case it must be ascertained whether the hypothecary act imports a confession of judgment or not.

We suggest that this must be ascertained in any case.

(b1) When There Is Executory Title.

(b1a) And No Partition Among Heirs.

If so, and there have been no partition of the estate among the heirs, the creditor shall be entitled to seize and sell the hypothecated property, as if the original debtor were still alive.

(1) No need to provoke administration, or to notice pending administration. Heirs (and widow in community if hypothecated property is community) stand in place of debtor, and notices are served on them. If they are absent, or minors, curator ad hoc appointed to them. Randolph, 21 A. 486; Riley, 26 A. 294; Truxillo, 47 A. 14; Buddecke, 31 A. 574; Boguille, 1 A. 204; Dupuy, 2 A. 513; Nichols, 6 A. 447; McCalop, 12 A. 551; Wilson, 12 A. 592; Vincent, 19 A. 529; Lavillebeuve, 20 A. 374; Gally, 30 A. 325; Gillaspie, 30 A. 1315, 1321; Morris, 34 A. 662; Bank, 45 A. 184, 189, 11 Sou. 876; Soniat, 118 La. 851; Walmsley, 36 A. 226.

But notice must be also served on administrator or other legal representative. Gillaspie, 30 A. 1521; O'Hara, 26

A. 370. Heirs present, necessary parties. Labauve, 31 A. 138, 142; C. P., Art. 123.

(2) The acceptance of the succession referred to in this article and in the preceding is either the absolute acceptance or the acceptance with benefit of inventory. Boguille, 1 A. 206, and other cases cited in note 1.

(3) And creditor can proceed to seize and sell in spite of pending administration, even though he has elected to proceed via ordinaria, when he has obtained judgment recognizing his mortgage, provided he had against the decedent an executory title. Truxillo, 47 A. 14, 15; Levy, 43 A. 1035; Bienvenue, 33 A. 218, 219. These decisions sustain the views of Wyley, J., dissenting, in Patrick, 25 A. 155, and overrule the decision of the majority on this point. See note 7 to Art. 68.

(4) Where a community creditor has a mortgage importing confession of judgment, he may proceed by executory process, after the death of the wife, against the surviving husband alone. Landreaux, 43 A. 234, 9 Sou. 32; Hooke, 46 A. 356, 15 Sou. 150, 23 L. R. A. 803; Cason, 32 A. 792; Luria, 114 La. 389, 38 Sou. 279; Durham, 32 A. 162; Killelea, 37 A. 865; Oriol, 38 A. 759; Verrier, 48 A. 717, 19 Sou. 677.

(b1b) When There Has Been Partition Among Heirs.

But if there has been a partition among the heirs, and the hypothecated property has fallen to the share of one or more of them, the creditor may obtain an order of seizure against those heirs, and sell the property for the amount of this claim, leaving to them their recourse against their co-heirs for their proportion of the debt.

C. P. 121.

R. C. C. 1417, 1418, 1433 et seq.

(5) This last paragraph simply diminishes the number of heirs necessary to be made parties. In order to obtain executory process, however, only against those heirs who are in possession of the hypothecated property, we apprehend that there must be authentic or record (judicial) evidence of the partition.

(b2) When There Is No Executory Title.

Art. 67. But if the hypothecary act do not import confession of judgment, the creditor cannot seize and sell the hypothecated property in the possession of the heirs of his debtor, or of any one of them, until he has obtained a judgment against each one of the heirs, for such a part of the debt as he is bound to pay, according to the share he has inherited, unless the creditor prefer to have the judgment executed personally against the heirs or their property, for such sums as each of them has been adjudged to pay.

C. P. 120, 121.

(1) Such action is personal and not real. See note 1 to Art. 64; Hart, 49 A. 1590. It is almost needless to add that if, however, the creditor had obtained judgment against the debtor before his death, recognizing his mortgage, and ordering it executed against particular property, the creditor could proceed to seize and sell such property, whether or not there be an administration in progress, and whether or not in the possession of one or more of the heirs.

(C) WHEN HYPOTHECATED PROPERTY IN HANDS OF THIRD PERSON.

Art. 68. If the hypothecated property be neither in the possession of the debtor nor of his heirs, but in that of a third person, the creditor has his action against that person, in order to compel him either to give up the property or pay the amount for which it stands hypothecated. This is the **hypothecary action**, properly speaking.

R. C. C. 3397, 3399 et seq.; C. P. 709, 123.

(1) This is called the "hypothecary action, properly speaking," to distinguish it from the simpler cases of hypothecary action. It will be found that frequently in

the reports the hypothecary action proper is called simply the "hypothecary action," as in Reggio, 26 A. 532. See Troendle, 33 A. 759.

Effect of Pact de Non Alienando.

(2) As we have seen, if the act of mortgage be in authentic form and contain the pact de non alienando, the creditor may still proceed against his mortgagor, and seize the property in whosever hands it may be, with notice to no one except his mortgagor or his succession. Note 1 to Art. 63, cases there cited, and the following: Thompson, 42 A. 118, 7 Sou. 477; Daniel, 50 A. 396, 23 Sou. 241; Gay, 44 A. 302, 10 Sou. 775; Bank, 44 A. 334, 10 Sou. 728.

(3) And this right to so proceed still exists, although the property has been seized and sold under a junior mortgage. Troendle, 33 A. 753; Daniel, 50 A. 396, 23 Sou. 241. Or by any other judicial process. Avegno, 35 A. 585; Levy, 48 A. 413, 19 Sou. 260; Levy, 48 A. 540, 19 Sou. 260; C. P. 709; Thompson, 50 A. 753.

(4) The creditor cannot proceed via executiva against his mortgagor, when the property is in third hands, unless the pact de non existed. Reggio, 26 A. 532; Fontelieu, 116 La. 882; Leonard, 37 A. 299, 303; Taylor, 24 A. 551; Williams, 3 A. 227; Massey, 24 A. 28.

(5) But the creditor, although he has the pact de non, is not compelled to avail himself of it. He may proceed against the subsequent vendee. If he does so, however, it must be by the hypothecary action proper. Troendle, 33 A. 753, 759.

Hypothecary Action Properly Speaking.

(6) The hypothecary action proper is, strictly speaking, not via ordinaria. Where the mortgage is by act importing confession of judgment, the creditor is entitled to executory process against the third possessor, the only requirement being that he give the notices prescribed by Art. 69 and comply with Art. 70. Montejo, 33 A. 1118; see Art. 69, 2, (b); 70, 1.

(7) It does not in the least alter the position of the creditor who has executory title, to his disadvantage, that

he has proceeded via ordinaria against his mortgagor and obtained judgment recognizing his mortgage. Levy, 43 A. 1034; Truxillo, 47 A. 14, 15; Montejo, 33 A. 1118; Lalane, 42 A. 152, 156; Bienvenue, 33 A. 218, 219; see note 3 to Art. 66, b, 1, a.

(8) Where the third possessor has assumed the payment of the mortgage on purchasing from the mortgagor, it is a stipulation pour autrui, and the creditor can accept it and avail himself of it or not, as he sees fit. It detracts nothing from the pact de non. But if the creditor who has executory title and authentic evidence of the assumption so elect, he may accept the assumption and proceed by executory process against such third possessor. Bank, 44 A. 200, 206; Henry, 27 A. 670; Boissac, 16 A. 187; Lee, 25 A. 397; Ricard, 19 A. 181; Vinet, 48 A. 1254, 1273, 20 Sou. 693.

(9) The creditor is entitled to foreclose on part only of the hypothecated property, if he so desires. Burgess, 32 A. 1296. But the possessor of only a portion of the hypothecated property cannot require a division of the hypothecary debt, so as to make his property liable for only a pro rata portion thereof. Bagley, 10 R. 45; Truxillo, 47 A. 17; Powell, 31 A. 794. A special mortgage is indivisible as to the holder of any of the property. Morris, 30 A. 1312, 1314; Anger, 36 A. 255; Lambeth, 38 A. 691; Blanchard, 116 La. 816.

(10) Where an undivided interest in property is mortgaged, no partition thereof among the co-owners or sale of a divided part can affect the right of the mortgagee to proceed against the undivided part mortgaged to him. Lee, 25 A. 397; Brannin, 32 A. 805, 810; Powell, 31 A. 789.

On Judicial Mortgage.

(11) A judgment for money, duly recorded, becomes a judicial mortgage on all the real estate of the debtor situated in the parishes where the judgment is recorded. Dickson, 37 A. 795; Taylor, 15 A. 564. And this is true whether the owner's title to the property was recorded or not. Gallagher, 35 A. 829; Givanovitch, 36 A. 272; Dickson, 36 A. 684. But such mortgages against the owner

will be primed by mortgages recorded against the owner's vendor prior to the recording of the sale. Baker, 107 La. 490.

The judgment must be a valid signed judgment. Marchal, 27 A. 454; Immanuel, 112 La. 349, 36 Sou. 408.

Judgment recorded against a corporation after the appointment of a receiver produces no legal effect. Immanuel, 112 La. 349, 358, 363; Bell, 34 A. 785, 793.

Judgment in attachment suit against absentee is only in rem, and cannot become a judicial mortgage. Herber, 39 A. 1113, 3 Sou. 259; Baker, 114 La. 735.

On Legal Mortgage of Minor.

(12) A former minor cannot resort to the hypothecary action to enforce his legal mortgage until he has liquidated his claim against his former tutor by judgment, and the judgment is inadmissible as evidence unless accompanied by the proceedings in the case. Mayo, 34 A. 984; Gibbs, 29 A. 526. But it is not necessary that the proceedings have been advertised or taken contradictorily with creditors. Skipwith, 34 A. 28. Money judgments obtained during the minority, for money received by the tutor, will not support the hypothecary action. Cochran, 37 A. 221. These are mere periodical accounts required to be filed each year, and not final judgments. Schneider, 45 A. 876; Bedell, 37 A. 808. And where, after the termination of the tutorship, the former minor accepts the former tutor's individual obligation, payable at a deferred date, the hypothecary action will not lie. Kelly, 30 A. 1190.

The minor's mortgage affects all the immovable property owned by the tutor at any time after his appointment, although sold before minor's right arose. Skipwith, 34 A. 28; Schneider, 45 A. 875, 13 Sou. 175; Lyman, 47 A. 71, 16 Sou. 662. But the fact of tutorship and name of tutor must appear of record in parish where property is. Zeigler, 49 A. 145.

But judgment against tutor as condition precedent to hypothecary action is excused where tutor dies out of State, leaving no property. Cummings, 15 A. 289. Or has absconded. Trezevant, 24 A. 566.

On Privilege.

(13) Privileges duly preserved and recorded according

to law (R. C. C. 3271, 3272, 3273, 3274, 3275) follow the immovable into third hands, and support the hypothecary action. C. P. 709, 73.

Sale of Property Pending Action.

(14) Under the old jurisprudence, the property could be sold by the third possessor during the pendency of the hypothecary action, thus necessitating the bringing of a new action against the new vendee, and so ad infinitum. Taylor, 24 A. 551; Barelli, 16 A. 280. This terrible state of affairs was remedied by Act 3 of 1878, p. 31, amending Art. 2453 of the Civil Code. The whole subject is now controlled by Act 22 of 1904, p. 25, which in effect amends Art. 2453, R. C. C., and which see.

Prayer and Judgment.

(15) The prayer of plaintiff's petition must, of course, ask for the judgment which the law authorizes. It is only necessary to examine what the judgment should be. This article says, in general terms, that the action is brought against the third possessor "in order to compel him either to give up the property or pay the amount for which it stands hypothecated." These words have been oftenest followed in shaping the judgment, and in some cases the judgment has been made to conform to these very words. Thus, in Wolfe, 45 A. 1109, the defendant is condemned to deliver up the property to be sold, and, in default thereof within ten days from demand, he is personally condemned for the amount of the debt and costs. But this is, to the writer's mind, clearly error. The hypothecary action proper is in rem, and not in personam. Labauve, 31 A. 141. The words quoted from this article must be construed with the articles which follow this. The proceeding is very clear. The defendant possessor is given ten days from notification of the demand (that is, of the suit) in which to pay the debt. Art. 69. On his failure to do so the property is ordered to be seized and sold to satisfy the debt, the defendant having up to the day of the sale the right to pay the debt and retain the property. Art. 74. There is nowhere any justification or authority in this Code (except the general words above quoted) for a decree ordering the defendant to deliver up the property to be sold. Such a decree is

in its very nature in personam, and has no place in this action in rem. The action is entirely against the property, and it is purely optional with the debtor to save his property by paying if he wants to. The ten days' notice is the counterpart of the three days' notice given the debtor in the ordinary executory process. Art. 735.

The Court, in the Wolfe case, *supra*, fell into said error from following the judgment in Desobry, 9 A. 182. The decree in the Desobry case was amply justified by the facts of the case. The hypothecated property was a slave, which could not be found to be seized, and the defendant having admitted that he bought the slave and refused to say what disposition he had made of it, the decree was proper and necessary under the circumstances. The action had been changed, after the Sheriff had returned that the property could not be found, from the *via executiva* to the *via ordinaria*; and the concealment of the property justified the personal judgment against defendant. p. 181.

The writer's opinion is that, if the action is *via executiva* (C. P. 744), a writ of seizure and sale should issue ten days after notice of the suit, if defendant has not, in the meantime, paid; that, if the action is *via ordinaria*, the decree should be that the property be seized and sold, after ten days from the finality of the judgment (or after ten days from the notification of the judgment, in cases where the law requires such notice), unless the defendant has paid within such ten days. It is useless to mention defendant's right to pay in the decree, for the law confers this right, whether or not, not only during the ten days, but up to the day of sale. Art. 74.

The relinquishment of the property by the third possessor is purely optional with himself. See R. C. C. 3405, 3406. In the light of these and accompanying articles of the C. C., the writer believes that the decree in the Wolfe case, *supra*, was erroneous.

Proceedings.

Art. 69. If, thirty days after the amicable demand, made from the Debtor or his heirs, of the payment of an hypothecary debt, it has not been fully discharged, the creditor may bring his action against the third possessor

of the property hypothecated to him, to have it seized and sold, if that third possessor have not, within the ten days after having been notified of such a demand, paid the amount of the hypothecary debt, including the interest and costs.

R. C. C. 3401.

(1) This article and those following prescribe the forms to be followed when the creditor is proceeding by executory process, upon a title importing confession of judgment, against a third possessor or possessors. C. P. 744; Montejo, 33 A. 1118.

When the creditor is proceeding upon such a title against the debtor or his heirs, the forms are prescribed in the chapter on Executory Process (Art. 732 et seq.). C. P. 63.

(2) **Successive Steps to Be Taken:**

(a) Amicable demand upon the debtor made thirty days prior to the institution of the suit.

This is the amicable demand required by Art. 3401 of the Civil Code. It is in this article of the C. P. merely referred to rather than provided. The particular form of such amicable demand is nowhere provided.

In Kelly, 30 A. 1192, it was held that demand by letter was not sufficient, even though the debtor testified that he had received the letter, and that a formal demand is necessary, citing Broussard, 6 N. S. 310; and Robichaud, 4 La. 125. Neither of these two decisions prescribe any particular form for the amicable demand. It must have been made, and that is all.

The writer believes that any form of amicable demand will suffice, and that, in spite of the Kelly case, *supra*, it may be made by letter. The creditor must be prepared, however, to prove that the demand has been made, in case it is controverted; and proof of the mailing of a letter is not proof that the debtor received it. See Boone, 35 A. 284; Gomez, 8 A. 304.

This thirty-day demand on the debtor is necessary whether the creditor proceeds against the third possessor via *executiva* or via *ordinaria*. Gentis, 15 A. 104.

This notice is, however, dispensed with when it would be vain or impossible. As where the debtor is bankrupt.

King, 24 A. 508. And see Cummings, 15 A. 289. And so where third possessor has assumed the debt. Twitchel, 6 R. 407; see note 8 to Art. 68; Duncan, 1 R. 135; Schlatre, 19 A. 125.

(b) The next step is the institution of suit against the third possessor. If the creditor sues via ordinaria, the proceedings have no place in this chapter. They are governed by the rules of ordinary actions, which are given in a subsequent chapter. For prayer of petition and judgment to be rendered, see note 15 to Art. 68.

(c) If the creditor sues via executiva, as he can do in a proper case, the next step is to have notice of the demand (i. e., of the suit) served upon the third possessor.

The old Code had a semicolon in this article after the words "seized and sold." The Code of 1870 has a comma at this place.

The older decisions, many of them, held that the notice here required was notice of the demand which had been made upon the debtor, and that this notice should be served ten days before bringing the suit, and was a condition precedent to the suit, which would be dismissed on exception if this notice had not been given. Taylor, 15 A. 564; Kelly, 30 A. 1191.

Other cases hold, and with much better reason, that the ten days' notice is required only after suit is brought, and allows the third possessor ten days in which he may pay before writ of seizure and sale issues. Wilcoxon, 8 A. 461; Montejo, 33 A. 1118. Both of these decisions were rendered on rehearing, reversing the prior decrees, which shows that the matter had received full attention.

A reflective reading of the article will show that this latter view is correct. The action is brought to have the property "seized and sold if that third possessor have not within the ten days after having been notified of such a demand" (action) paid the debt with interest and costs. There could be no "costs," in the usual sense of that term, if a suit had not been begun. This ten days' notice is the counterpart of the three days' notice required by Art. 735 when the executory proceedings are against the debtor or his heirs. It is uniformly held that the three days' notice is to be served after the suit is filed.

This notice must, of course, be served by the Sheriff, as in the other form of executory process. State, 16 A. 390.

Evidence Required to Obtain Order for Executory Proceedings.

Art. 70. But the creditor who brings this action must declare on oath, in the petition, that the debt for which he demands the seizure of the hypothecated property is really due to him, and that he has in vain demanded payment from his debtor thirty days previous to his bringing his suit.

R. C. C. 3402.

(1) This article, to our mind, establishes the correctness of the view we have taken as to the notices referred to in the preceding article. No proof is required of any notice to the third possessor, which shows that no such notice is contemplated until the petition is filed.

No other proof of the demand on the debtor thirty days previous is required than the affidavit of the creditor annexed to his petition. Wilcoxon, 8 A. 461; Montejo, 33 A. 1118.

This article only requires such an affidavit if the proceedings are executory. If the creditor proceeds via ordinaria, he would merely be required to prove the demand upon the debtor, on the trial of the case, as any other necessary allegation of the petition. Gravier, 4 La. 239; Smith's, 2 La. 132; Kelly, 30 A. 1192.

(2) The affidavit that the debt is really due, and that demand has been made upon the debtor, is the *prima facie* proof upon which the Judge issues the order for executory proceedings. Notice of this demand and order is then served upon the third possessor, and he has ten days within which to appeal from the order, if he sees fit. State vs. Judge, 16 A. 390; Borah, 121 La. 733, 752.

GROUND OF OPPOSITION ON PART OF THIRD POSSESSOR.

(1) Discussion.

Art. 71. Nevertheless, if the third possessor, against whom the action is brought, be not personally bound for

the payment of the debt, he may oppose the sale of the hypothecated property, if there be other hypothecated property in the possession of the original debtor, and require its previous discussion, pending which the proceedings as to the sale of the property shall be staid.

C. P. 715.

R. C. C. 3403.

(1) In proceedings *via ordinaria* the rules governing the plea of discussion are laid down in Arts. 332, 333. Chaffe, 34 A. 962; Boone, 35 A. 284.

If the proceedings are executory, the third possessor does not oppose the sale by answer or exception, but must come in by a petition of opposition, and he must do this within the ten days allowed him from notice of the demand and order of seizure. R. C. C. 3403. It was held in Lewis, 13 A. 382, that this provision of the Civil Code had been repealed by an act in 1828. It has now, however, been re-enacted, and should be considered to be law, not being in conflict with the Code of Practice. The opposition may, however, be filed after the ten days if writ of seizure and sale has not in the meantime been issued and the property seized. Lewis, 13 A. 382. It is also held in the Lewis case that the third possessor may, for good cause, enjoin further proceedings, even up to the day of sale, by analogy to the injunction allowed in the other form of executory process.

Discussion, however, being viewed as merely a dilatory objection, should be interposed before the seizure of the property.

Prerequisites to Discussion.

Art. 72. The third possessor who requires discussion shall be bound to designate to the plaintiff the property of the principal debtor which he wishes to have discussed, and advance the costs required for carrying on the necessary proceedings in order to execute this discussion.

He is not entitled to demand the discussion of such property of the principal debtor, which may be out of the jurisdiction of the tribunal of the place where the pay-

ment was to have been made, nor that of property in dispute, or out of the possession of the debtor.

R. C. C. 3047.

(1) On pointing out property and advancing costs. Schmidt, 33 A. 18; Mathews, 27 A. 203; Pipes, 25 A. 560; Adams, 22 A. 42; Elmore, 18 A. 652.

Discussion Not Allowed, When.

Art. 73. The exception of discussion cannot be opposed to the privileged creditor, or to one who has a special hypothecation.

R. C. C. 3404; Powell, 31 A. 789; Anger, 36 A. 254; Burgess, 32 A. 1296.

(2) Other Grounds of Opposition.

Discussion is not the only objection which the third possessor may urge. See R. C. C. 3403; note 1 to Art. 71, *supra*. It stands to reason that he may set up any matter which would defeat the hypothecation claimed against his property, as want of registry. R. C. C. 3403. Invalidity of judgment. Marchal, 27 A. 454. Prescription of judgment. Wade, 24 A. 211. Non-existence of minor's mortgage. Kelly, 30 A. 1190. Non-validity of conventional mortgage. State, 33 A. 705.

See note 1 to Art. 71 as to when and how such grounds of opposition must be urged. Injunction seems to be the method most often used. We cannot lay down any precise rules in this regard because, except in the Lewis case, 13 A. 382, the subject has received no attention from the courts. We suggest that the Lewis case be followed where applicable, and the practice in executory process against the original debtor.

Right to Redeem up to Day of Sale.

Art. 74. Third possessors of property which has been seized, owing to their failure of discharging the amount of the hypothecary debt, within ten days after having been notified that payment has been demanded of

the hypothecary debt, may until the very day of sale, recover possession of the hypothecated property, by paying the debt with interest and all the costs incurred in the suit.

Other Rights and Liabilities.

(1) The third possessor's liability for deteriorations attributable to his fault, for fruits and revenues after notification of the order of seizure, and his right to reimbursement for expenses and improvements, and other rights, are regulated by the Revised Civil Code, Arts. 3407 to 3410, inclusive.

(Author's § 4.)

(74A.)

Of the Action to Establish Title to Real Estate.

Act 38 of 1908, p. 38.

AN ACT to authorize the institution of suits to establish title to real estate where none of the parties are in actual possession of the same.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That in all cases where two or more persons lay claim to land by recorded title and where neither of said claimants are in the actual possession of the land so claimed; either of the claimants may bring suit against one or all the adverse claimants, and for that purpose may join one or more adverse claimants in the same suit as defendants, to have the titles to the land adjudicated upon by the court having jurisdiction of the property, and it shall not be necessary for the plaintiff to allege or prove possession in himself or the defendants, and this action shall be known as the action to establish title to real estate, and the judge shall decide which of the claimants are the owners of the land in dispute, provided such judgment shall in no case be res adjudicata as to persons not made parties to the suit.

SECTION 2. *Be it further enacted, etc.,* That this act shall in no wise be construed to alter, change or repeal the rules established by the Code of Practice as laid down in Chapter 2, Section 3, relative to possessory and petitory actions.

(1) This action "differs from a petitory action only in the allegation that defendant is not in possession. It does not differ from a petitory action in the matter of the obligation of the plaintiff to establish the title set up by him; and where, in such case, it appears that plaintiff acquired one of the titles relied on from a person who had no title, and made no such pretense, while defendant has been in possession for several years under a title which is good upon its face, plaintiff cannot recover. Where, however, as to a portion of the land claimed, plaintiff exhibits a valid tax title, he is entitled to judgment thereon." Davidson, 131 La. 1047, 60 Sou. 679.

"The first question in the case is whether the plaintiffs ever had a legal title to the lands in controversy; and, if this question is answered in the affirmative, the next is whether such title has ever been divested." Police Jury, 131 La. 1066.

From the foregoing it may be gathered that in this action, as in the petitory, the plaintiff must succeed on the strength of his own title, and not on the weakness of that of his adversary; that the burden of establishing an apparently valid title is primarily on the plaintiff.

(2) It also appears from the Davidson case, *supra*, that, although plaintiff must allege that neither party is in actual possession, the allegation amounts to nothing as far as defendant's possession is concerned; and, although the defendant is proved to have been in actual possession for a long time, such fact does not defeat the action, but the Court will nevertheless decide the question of title.

And defendant's exception of possession in himself, and that plaintiff should bring petitory action, will not be noticed. Knight, 130 La. 235, 241. Defendant may set up possession and title by prescription. Knight, 130 La. 233. See note 5.

(3) As in the petitory action, the allegation of ownership opens the door to proof of title, whether the chain of

title be set out or not. The petition would be open to the exception of vagueness, and plaintiff could be required, in limine, to declare his title in full; and, even after issue joined, the Court may, in its discretion, extend relief to the defendant in case of surprise. *Folger*, 130 La. 1084, 58 Sou. 890.

(4) If neither party shows title, nonsuit will be ordered. *McQueen*, 130 La. 1071, 58 Sou. 886. Or the case remanded for trial de novo. *McQueen*, 130 La. 1076.

(5) Where plaintiffs allege that they "openly possess" the land, the action cannot be considered as brought under this act. *McHugh*, 129 La. 681, 683; *Davidson*, 126 La. 539, 52 Sou. 758.

But the mere allegation of possession in plaintiff, without qualifying such possession as *actual* or *open*, would not prevent the action falling under this act. *McMejon*, 126 La. 604.

(6) The issue is confined to lands sued for by plaintiff. Defendants cannot bring in the question of title to other lands. *Knight*, 130 La. 234, 57 Sou. 900.

(7) This act does not apply to suits instituted before its passage. *Lacroix*, 135 La. 268.

(8) *Recorded Title*, wide range allowed term. *Baltimore*, 135 La. 873, 879.

(Author's § 5.)

(74B)

Of the Action of Jactitation or Slander of Title.

Necessity for.

(1) "The action of slander of title is not one of the actions provided for in the Code. It is the child of necessity. Without it the owner in possession would be helpless against the slanders of his title. Being in possession, he could not bring the petitory action; and, his possession being undisturbed, he could not bring the possessory action. But this child of necessity cannot be recognized beyond the necessity that has given it birth. Hence, if plain-

tiffs are out of possession, they must bring the petitory action. Otherwise, after they should have vindicated their title in the present suit, they would have to bring another to recover possession, and thus vex the courts and burden defendant with a multiplicity of suits, which is a thing the law abhors and will not tolerate." Provosty, J., in Patterson (1904), 112 La. 1074.

Origin of.

(2) This action is inherited by us from Spanish law and jurisprudence. Livingston, 9 M. 713, 714.

"The object of this law was intended to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion; to force the defamer to bring suit, and throw the burden on him of proving what he asserted." Porter, J., in Livingston, 9 M. 714. See Young, 129 La. 339; Matthews, 126 La. 120; Remick, 47 A. 923; McConnell, 46 A. 567; Craig, 44 A. 886.

Possession in Plaintiff Necessary.

(3) It is uniformly held that, to maintain this action, the plaintiff must be in possession. Although called "slander of title," the slander is uniformly held to be an injury to the possession rather than to the title. Therefore, if plaintiff fails to allege and show actual possession in himself, his suit falls, without inquiry into any other matter. Young, 129 La. 343; Patterson, 112 La. 1069, 36 Sou. 857; Labarre, 130 La. 134; McHugh, 131 La. 680; Potts, 131 La. 421; South, 119 La. 193, 197, 198; Williams', 117 La. 607; Patterson, 112 La. 1074; Poland, 48 A. 84; Williams, 12 A. 878; Walmley, Manning's Unrep. 162; Copley, 4 A. 581; Lange, 32 A. 700; Labarre, 133 La. 854, 63 Sou. 380; Miller, 134 La. 226, 229.

Defenses.

(4) "The action admits of three responses: first, a denial of plaintiff's possession (see note 3, supra); second, a denial of the slander; third, an admission of the slander. In the last case, if he simply admits the slander, without setting up specific title in himself, the appropriate judgment is one ordering him to bring suit and establish his pretensions." Fenner, J., in Dalton, 35 A. 357. See Williams', 117 La. 605; Craig, 44 A. 890.

(5) But the Court cannot fix a delay within which defendant must bring suit to establish his title, nor prescribe a penalty for failure to bring such suit within any given time. Young, 129 La. 339, 341, 344. With all due respect to the jurisprudence, it seems to the writer that the proper decree, where defendant admits the slander without setting up title in himself, is one enjoining him from further slandering plaintiff's title until he has brought a petitory action and established his own title. What purpose is served by ordering something done without a time limit, and without a penalty for non-performance?

How Changed to Petitory.

(6) Defendant may, without denying plaintiff's possession, set up title in himself. Defendant then becomes plaintiff in a petitory action, and the burden is on him to establish his title. In other words, the action is changed into a petitory one, with defendant as plaintiff. Livingston, 9 M. 656, 715; Clarkston, 32 A. 613, 614; Lange, 32 A. 700; Remick, 47 A. 914, 923; Poland, 48 A. 84; Maes, 7 N. S. 315; Proctor, 11 La. 188; Chadwick, 49 A. 762; McConnell, 46 A. 564, 15 Sou. 424; White, 49 A. 1661, 22 Sou. 931; Gay, 33 A. 249; Havard, 24 A. 511; Sully, 40 A. 558; Bidwell, 27 A. 307; Millaudon, 18 La. 102; Short, 11 A. 174; Dalton, 35 A. 355; Garrett, 131 La. 707, 60 Sou. 199.

(7) Or defendant can deny plaintiff's possession, and in the alternative, and only in the event that plaintiff be found and decreed to be in possession, set up his own title. In such case, if the Court decides that plaintiff is not in possession, it dismisses his suit. If it decides that plaintiff is in possession, it then proceeds to try the petitory action with defendant as plaintiff. But defendant admits plaintiff's possession by setting up title without reservation. Short, 11 A. 174; Craig, 44 A. 889; South, 119 La. 194, 195, 197; Young, 129 La. 340; Perry, 132 La. 415, 61 Sou. 511; Labarre, 130 La. 136.

(8) A husband, after his wife's death, sold community property as his own. He afterwards proclaimed that it was his intention to recover the one-half of the property he had sold for the benefit of his minor children as heirs

of their mother. He was sued as tutor of his children, by his vendee, for slander of title. The Court held that no judgment could be rendered concerning the property which would bind the minors. The tutor being the warrantor of plaintiff, and his interest adverse to the minors, they should have been represented in the action by the under-tutor. Proctor, 11 La. 186.

Plaintiff's Possession Belongs to Merits.

(9) When want of possession in plaintiff is set up by defendant as an exception, such exception should be referred to the merits. Possession in plaintiff is one of the issues tendered, and this issue should be tried with the merits. Short, 11 A. 174; Poland, 48 A. 84; Dalton, 35 A. 356; Williams', 117 La. 607; Craig, 44 A. 887; South, 119 La. 194.

But plaintiff's failure to *allege* possession in himself is ground for exception (of no cause of action). Williams', 117 La. 607.

See, also, Miller, 130 La. 664, 665; Labarre, 130 La. 136.

Therefore, after trial, although plaintiff is dismissed for want of possession, the Court must decide as to intervenor. Labarre, 126 La. 982.

Damages for Slander.

(10) In order to recover damages for the slander, plaintiff must prove malice, or want of probable cause for the act of slander committed. Walden, 2 R. 331; Williams, 12 A. 878; Lange, 32 A. 697, 703, on rehearing.

Replication Not Permitted.

(11) Even where defendant's answer alleges title, and he becomes plaintiff in petitory action, no replication should be permitted. Craig, 44 A. 886, 889; Young, 129 La. 340; South, 119 La. 196.

Oyer of Title.

(12) Defendant is not entitled to oyer of plaintiff's title, no title being in issue until defendant has set up title. Williams', 117 La. 600, 605. But plaintiff, after he has become defendant, may demand oyer of defendant-plaintiff's title. Williams', 117 La. 606; South, 119 La. 195, 196.

Venue of Action.

(13) The action is one of revendication, and may always be brought in the parish where the property is. Williams', 117 La. 600, 608. But in so far as the action is for a money judgment for damages, the defendant may except to the jurisdiction of a court other than that of his domicile. Williams', 117 La. 600, 608.

Duration of Plaintiff's Possession.

(14) Plaintiff must have been in possession for a year and a day before the date of bringing suit. Williams', 117 La. 611; Matthews, 126 La. 120, 122; Hanson, 130 La. 688, 58 Sou. 511; Miller, 134 La. 229.

(15) *The prayer for general relief* can never be so stretched as to permit plaintiff in this action to have the question of title passed upon where he fails to show possession. His suit must fail. South, 119 La. 197; Young, 129 La. 341.

(16) *Constructive possession*, or possession of a tract by virtue of its being part of a larger tract, of which plaintiff has actual possession of part with title to the whole, is such possession as will support the action for slander of title. Perry, 132 La. 416, 61 Sou. 511.

(17) The Court cannot pass on the question of title unless (1) plaintiff is found to be in possession, and (2) defendant sets up his own title, and thus puts the title at issue. Potts, 131 La. 421, 59 Sou. 837.

(18) Defendant who has assumed the position of plaintiff in petitory action has no interest or right to plead an outstanding title as against the rights of plaintiff in possession. Garrett, 131 La. 708, 60 Sou. 199.

(19) **Buildings and standing trees**, being immovable property, may be the subject-matter of this action. Labarre, 126 La. 982, 53 Sou. 113; Lange, 32 A. 697.

(20) The question of possession *vel non* in plaintiff is always the first question to be decided. If decided in the negative, every other question raised goes out of the case, and the suit is dismissed at plaintiff's cost, on this issue alone. Any **sequestration** sued out by either party, or is-

sued ex officio by the Court, falls and terminates with the suit, at the cost of the party who sued it out. Labarre, 133 La. 854, 63 Sou. 380.

(Author's § 6.)

(74C)

Of the Action to Remove Cloud on Title.

(1) We make this separate heading with reluctance, because we feel convinced that no such separate or distinct real action exists. But the Supreme Court of the State in two recent decisions has (apparently) recognized the existence of such an action, and has (apparently) recognized it as having attributes peculiar to itself, and differentiating it from all other real actions. The Court justifies the action on the ground of necessity, and says that without it the plaintiff would be remediless. 130 La. 660; 123 La. 461.

The two decisions referred to are *Lacroix vs. Villio*, 123 La. 459, 49 Sou. 20; and *Atchafalaya vs. Brownell*, 130 La. 657, 58 Sou. 500.

We will attempt to digest these two decisions, and to show that in both cases it was entirely unnecessary to recognize the existence of any new real action, different from those permitted by the law and jurisprudence at the time.

(2) *Lacroix vs. Villio*, 123 La. 459:

In this case plaintiff alleges himself to be "owner and possessor," and sets out his title. He alleges that the defendant had cut out of the public records a sale on which plaintiff's title depended, and had himself procured a sale from the party who had previously sold to plaintiff's author; that by recording his own sale defendant had slandered plaintiff's title and cast a cloud upon same.

The prayer of the petition is for cancellation of defendant's fraudulent sale, and for damages, actual and punitive.

Plaintiff failed to prove actual possession, and the defense was based entirely upon that fact, the defendant contending that the suit was one in jactitation, and that it

was necessary for plaintiff to prove possession before recovery (under all the decisions cited under Jactitation, ante).

The Court held that plaintiff had proved all his allegations except possession (actual) (we omit all reference to the amount of damages for brevity and clearness); that, if slander of title could not be brought, no action could be, and plaintiff would have no remedy; that, neither party being in possession, neither the petitory nor the possessory action could be brought. The Court refers to Act 38 of 1908, but does not apply it, probably for the reason that the suit was instituted before that act was passed.

On rehearing the Court justifies the judgment rendered on the authority of Arts. 2315 and 21 of the Civil Code.

The only fault, in our humble opinion, to be found in the opinion in this case, lies in recognizing the action to be one of slander of title, in the strict technical sense of that term, as relates to real actions; and on the rehearing the Court in effect repudiates that view.

Plaintiff's petition tendered neither title nor possession as an issue, and the action was in fact not a real action. If the allegations of the petition were true, defendant had no title nor semblance of title. He was attempting to steal plaintiff's title by cutting the record of plaintiff's deed from the conveyance book and recording his own. This fact established left defendant without a title or a semblance of title, and left no room for a contest as to title. Plaintiff was not seeking to have the defendant assert his title, or desist from slandering, as in jactitation proper.

Therefore, when the Court found the facts to be as plaintiff alleged, there was nothing to do but to order the fraudulent sale, which represented and stood for nothing, expunged, and award plaintiff damages for the fraud.

If defendant had at the time another valid title to the land, there is nothing in the judgment as it appears which would prevent the defendant from asserting such title in another suit.

This judgment does not settle forever all question of title between plaintiff and defendant as to the land described in the fraudulent sale, as it stood at the time of the suit. The suit was directed against one particular fraudulent evidence of title, which it sought to have destroyed. This fraud alone was in issue, and neither the

title nor the possession of this land was at any time at issue in this suit.

Therefore, the Court properly, on the rehearing, regarded the action as a personal, or quasi-personal, one, and granted relief accordingly.

(3) *Atchafalaya vs. Brownell*, 130 La. 657:

Plaintiff's petition presents a jactitation suit, pure and simple. The defendant interposed the special defense that plaintiff was not in actual possession. The Court seems to hold that it is not a jactitation suit proper, but on what grounds does not appear, as the petition presents every earmark of the jactitation suit.

In the alternative, and with full reservation of its special defense, defendant set up its title and prayed to be decreed the owner.

The Court held that, to maintain an action for the cancellation of an adverse title, plaintiff, having a recorded title, did not have to be in possession.

The Court then proceeded to adjudicate upon and decide between the opposing titles of the parties, and decided in favor of the strongest title. The Court said that if plaintiff did not have the right to bring this action it would be remediless (p. 660), and cites *Lacroix vs. Villio*, *supra*.

In the same volume, in *Labarre vs. Burton-Schwartz*, p. 135, a case almost on all-fours with this one, the lower Court had decided intervenor to be in possession, and had then proceeded to decide the question of title. The Supreme Court reversed this judgment on the ground that intervenor had not shown possession, and, finding that defendant was not in possession either (plaintiff had retired from the case), said that the question of title could be decided under Act 38 of 1908 (p. 138).

Why the question of title in the case under discussion could not have been decided under Act 38 of 1908 is not shown.

Now, does the Court mean in this case to absolutely abrogate and set aside the rule that to maintain slander of title plaintiff must be in possession? Apparently not, for the opinion says on p. 659 that the jactitation suit proper can, without doubt, be brought only by one in

actual possession. What the Court fails to do is to show how this is not a jactitation suit proper.

In all the decisions since, which are cited, *supra*, under Jactitation, the Court seems to adhere to the rule that possession in plaintiff is necessary.

We think the Court was prompted to take the view it did by a misconception of the issue in *Lacroix vs. Villio*, *supra*.

But we can look at only what was actually decided, and, standing as it does, this decision certainly creates a new form of real action, to which we have given the name at the head of this sub-section.

The only rule that we can lay down from this decision for this new form of action is as follows:

"A party claiming to be owner by title duly recorded, but who is not in actual possession, may bring a suit against another party, equally out of possession, to procure the cancellation of a title which that other party may have caused to be recorded against the property" (p. 660).

Now, if the Court had confined its scope of action as mapped out by itself in this quotation, perhaps no criticism could be justly aimed at this decision; but the Court went further and adjudicated the issue of title between the parties, decreeing plaintiff the owner, instead of limiting the decision to the cancellation of a particular piece or pieces of evidence of title, as in the *Lacroix* case.

We submit that there was *no necessity* for giving birth in this decision to a new real action. *Davidson*, 126 La. 539, 3; *Labarre*, 130 La. 138. The child of necessity should not "be recognized beyond the necessity which gave it birth." *Patterson*, 112 La. 1074.

Whether the action recognized and given birth in this decision will be maintained in future decisions as a new and distinct real action remains to be seen.

In conclusion, we suggest that the mere fact that plaintiff prays incidentally that the opposing title be canceled is not in itself necessity for the creation of a new real action. Such cancellation would result if defendant denied the slander or disclaimed title. And such cancellation is an incident to, or implied in, every judgment recognizing one title as superior to another.

(Author's § 7.)

(74D)

Of the Action for Trespass.*Is Personal Action.*

(1) The action for trespass is in its strict sense a *personal action*. Thus, if plaintiff alleges that he is the owner of a tract of land, and that defendant has trespassed on the land and cut and removed trees therefrom, for which he demands damages, and the defendant answers, merely denying the trespass complained of, the action is only personal. Bossier's, 119 La. 504; Coco, 25 A. 230.

See Bossier's, 114 La. 707, 38 Sou. 525, wherein it was held that, although the action was neither petitory, possessory, nor for slander of title, it might be maintained as an action for trespass (p. 711). See note 6.

But Based on Possession or Ownership of Land.

(2) But it rarely happens that the action for trespass stands thus alone. Plaintiff must ground his action either upon his possession or upon his ownership of the land or real estate trespassed upon, and defendant may put plaintiff to the proof of the ground alleged; or defendant may assert his own title and possession by way of defense, provided such defense conforms to the rules of real actions as hereinbefore given.

It may be said that so far as the action is for damages, or for the recovery of property, like timber, which has been severed from the land, the action is personal; and, in so far as the title or possession is in issue, the action is real. It will be found that nearly every action for trespass is cumulated with a real action. Gilmore, 115 La. 386, 402.

Based Upon Possession.

(3) It has long been held that *actual possession*, when sufficient to support the possessory action, *will support* the action for trespass, which, in such case, will be governed by all the rules of the possessory action (ante, Sub-Sec. 2). Litchworth, 4 M. (N. S.) 136. E. g.: Evidence

of title not permitted. Peytavin, 6 La. 554; Yarborough, 7 La. 153. Except to show nature and extent of possession. LeBlanc, 2 A. 223; McCutcheon, 14 A. 34.

In many of the cases the student will find it asserted that in the action for trespass defendant cannot put the plaintiff to the proof of title, the action being possessory. This must be understood to be limited to those cases where plaintiff has made his action possessory. Gardiner, 14 A. 732; Daigre, 48 A. 414.

The allegation of title does not make the action possessory. The prayer governs. Williams, 41 A. 702; Mott, 116 La. 629, 40 Sou. 921; Hermitage, 46 A. 430.

It follows that one who has maintained his possession of land for a year, whether in good or bad faith, can sue the real owner for trespass on the property in his possession and recover damages, as well as restitution of timber removed, or payment therefor. Nicol, 44 A. 816, 11 Sou. 34; Smith, 130 La. 471, 58 Sou. 153; Grant, 131 La. 865, 60 Sou. 374; Gray, 131 La. 922, 60 Sou. 617.

See, generally, Akers, 131 La. 833, 60 Sou. 363; Collins, 132 La. 161, 61 Sou. 150.

In Collins, 128 La. 250, 54 Sou. 788, it is held that the possessory action and the action for trespass may be cumulated in the same petition. How, under all the above decisions, this could ever have been doubted is hard to see. This case illustrates the cumulation of the two actions into one. The possessory could stand alone, but the action for trespass could not. It depends upon the possessory action, and upon the proof of all the requisites of a possessory action for recovery. The action, in so far as it seeks a personal judgment for money, is a personal action; but it is engrafted upon the possessory action, a real action, and becomes subject to all its rules. The practice is, therefore, and correctly so, to treat it as a possessory action. In the Collins case the two actions were cumulated. But, if damages alone had been asked for, there would not have been cumulation, but the action for trespass would have been *blended* into a possessory action.

Based Upon Ownership.

(4) Plaintiff may also engraft upon his petitory action a claim for damages for timber cut and removed.

Citizens' Bank, 120 La. 394, 45 Sou. 367. Whether this is properly called "trespass" is not so clear in every case, for one who has acquired the right of possession by actual possession for a year can hardly commit trespass on the land in his possession. But it seems to be so called (Poirier, 127 La. 936, 54 Sou. 292) where land was in defendant's possession and timber had been cut several years (p. 942). See note 9.

The action is petitory, however, only when the plaintiff prays to be decreed the owner of the land, or to that effect; and, therefore, although he alleges title, and alleges that timber had been removed from the land, and prays only to be decreed the owner of such removed timber, the action is personal only. Union, 124 La. 270, 50 Sou. 35.

(5) And there is certainly no reason why the action for damages for depredation or trespass on the land may not be engrafted on or cumulated with the action to establish title to real estate (ante, Author's Sub-section 4, 74A). *Issues in.*

(6) And it seems that the plaintiff, without making his action petitory, possessory, or the action to establish title, may simply sue for depredation upon, or damage to, his property. Such an action is purely personal; for, while plaintiff's ownership is the basis of his recovery, he states it as an assumed fact, and tenders the depredation or trespass as the issue. If the defendant merely denies the trespass, without disputing the plaintiff's ownership, or, admitting the trespass, joins issue only on the amount of damages, the action is personal, nothing more. Ball, 121 La. 627, 46 Sou. 674. See note 1; see note 9.

But defendant may, of course, in such a case, put plaintiff to the proof of his title, or may assert his own, to the land; and the title, in such case, must necessarily be decided. Union, 121 La. 554, 46 Sou. 649; McGee, 123 La. 696, 49 Sou. 475; Shields, 110 La. 714, 34 Sou. 747; Texas, 132 La. 1021, 62 Sou. 129. Still, the action is personal only. Adams, 110 La. 456, 34 Sou. 602; Gould, 134 La. 123, 63 Sou. 848.

(7) Although plaintiff's action is possessory, if defendant in answer alleges title, and asks to be decreed owner, he opens the door for plaintiff to prove his own

title. Frederick, 120 La. 783, 785; St. Paul, 116 La. 590. It must be remembered that defendant could not have changed the action into one of title without the consent or acquiescence of plaintiff. C. P. 55.

(8) In the action of trespass proper there can be no call in warranty, as it is a personal action for tort, and no one is allowed to plead the authority of a third person to commit a wrong. Hood, 2 A. 219; Coco, 25 A. 230; Bossier's, 114 La. 711.

But in McGee, 123 La. 696, 49 Sou. 475, call in warranty was permitted, and judgment rendered against warrantors, the case turning upon title, and call in warranty (apparently) not being objected to.

Against Defendant in Possession.

(9) There is a line of cases which hold that one who has acquired the right of possession by remaining in actual possession for one year prior to the cutting of timber or other depredation committed by him cannot be held liable in an action of trespass for such depredation. Hood, 2 A. 219, 220; Banks, 11 R. 483; Daigre, 48 A. 414, 417, 418; Leathem, 109 La. 339.

In the Leathem case, and probably in some of the others, this holding is grounded upon the good faith of defendant's possession. The timber taken is likened to the fruits which the possessor in good faith is freed from liability for by Art. 3453 of the Civil Code.

But the better view, amply supported by later authority, is that timber trees cut and removed, buildings or fences demolished or removed, oil or minerals taken from beneath the soil, cannot be classed as fruits. Elderbe, 135 La. 990, 995. See note 4.

The distinction between the destruction or removal of such property and the gathering of the fruits or products of the land is obvious. "Fruits" include what is grown upon the land, and gathered from year to year, in the usual course of husbandry; things which must be gathered when ripe or they will be a total loss. Taking timber trees, oil, mineral, buildings or fences is a destruction or consumption of the realty itself.

French authority, with the sole exception of Marcadé (Vol. 2, Art. 549, p. 414), sustains this view. Laurent, t. 6, no. 205; Journal du Palais, 1837, vol. 1, p. 126, Cass.

dec. 8, 1836; Duranton, t. 4, n. 350; Demolombe, t. 9, n. 62; Aubry et Rau, t. 2, p. 278; Baudry-Lacantinerie, Des Biens, no. 391, fol. 226; Supplemente to tome 2e, Laurent, p. 333.

These French authorities make an exception in the case of what they call "couple réglée" (regulated cutting or taking), which is a cutting or taking which the *owner* has established and practiced in a way to have from it a periodical income. Aubry et Rau, Vol. 2, p. 484, no. 230, note 27. This "regulated taking" has not yet been recognized in Louisiana jurisprudence.

Therefore, we can safely say that the doctrine announced in the cases cited in the first paragraph of this note is not the law.

Now, as observed in note 4, *infra*, whether the action for depredation committed by one who has had possession for a year is, in the strict sense, trespass or not, it seems to be so called; and properly so called, because the cause of action springs from offense or quasi-offense, and the action is subject to all the rules of the action for trespass. Prescription against recovery is one year from date of knowledge by plaintiff.

Shields, 110 La. 714, 717; Poirrier, 127 La. 936, 54 Sou. 292; Davis, 132 La. 985, 62 Sou. 114; R. C. C. 3537, as amended by Act 33 of 1902, p. 41.

But it may well be doubted that the owner, while such acquired right of possession continues in the trespasser, can sue him for the trespass alone. It seems that he must either first bring the petitory action and recover possession or must cumulate the action for trespass with the petitory. South, 120 La. 168. Such a question would not arise, however, where the defendant, the trespasser, has ceased to be in possession, as where he has sold the land and delivered possession to another; or where he bought the right to cut the timber from the possessor. Adams, 110 La. 456, 34 Sou. 602.

(Author's § 8.)

(74E)

Of the Action for the Ejectment of Tenants.

This action belongs properly in a book on practice, and, therefore, we introduce it here, taking from the Revised Statutes such sections as apply.

SEC. 2155. When any person, having leased any house, store or other building, or landed estate, for a term of one or more years or by the month or otherwise, either verbally or otherwise, shall be desirous of obtaining possession of the said leased premises upon the termination of the lease, either by limitation, or by non-payment of the rent when due, or any other breach of said lease, he shall demand and require in writing his tenant to remove from and leave the same, on allowing him ten days from the day such notice is delivered, and if the owner or his agent shall be desirous of obtaining the possession of the said leased premises for any other reason or cause, such as, for the purpose of leasing the said premises to another tenant, or otherwise, he shall give to the tenant a notice in writing to vacate, ten days before the expiration of the month, if same be a monthly lease, or thirty days before the expiration of the lease, if the said lease be in writing, and for a term of one or more years, or otherwise, other than by the month; and if the tenant shall refuse to comply therewith, and with the said notice, after the expiration of such delay, and to remove from the said premises, it shall be lawful for such lessor to cause the tenant to be cited summarily to show cause, within two days after service of such rule, to appear before any court, having competent jurisdiction, in order to be there condemned to deliver him the possession of the leased premises. On the day and hour that the said rule is made returnable, which day shall be the third day after the service of the said rule, the justice or judge shall immediately try the rule, and hear the defense to same, if any is made, and if no appearance is made by said tenant, either in person or through counsel, the said justice or judge shall give judgment against said tenant, ordering him to deliver to the

lessor the possession of the leased premises. If the tenant does not comply with the judgment, within twenty-four hours after the rendition of said judgment, it shall be the duty of said justice or judge who rendered the judgment to issue forthwith his warrant, directed to the constable, marshal or sheriff of his court, commanding him forthwith to deliver to the lessor the full possession of the leased premises, and to levee the costs of the case out of such goods and chattels of the tenant as are allowed by law to be seized; and in case the constable should find the windows and doors of the house, store or other building, or gates of the landed estate so leased, locked up, it shall be lawful for him, on a warrant issued to that effect by the justice or judge having competent jurisdiction, to break open the doors, windows or gates in the premises, in the presence of two witnesses, in order to put the lessor in full possession of leased premises. (As amended by Act 313, 1908, p. 479.)

(1) The suit is premature if brought before the expiration of the lease for any other cause than that defendant has violated the contract of lease. Jackson, 116 La. 51, 40 Sou. 528.

This suit was decided under this section as it stood amended by Act 52 of 1900, p. 84. The amendment of 1908, *supra*, provides for the service of the preliminary notice before the expiration of the lease, if desired. This, the writer thinks, could have been done under the act of 1900, so that the last amendment changed nothing in this respect.

(2) The judgment is executory twenty-four hours from rendition, not from signing or entering on minutes. The delay is computed in hours, not days. Appeal must be taken within this twenty-four hours, even if judgment not signed or entered.. Mallu, 128 La. 914, 55 Sou. 574; Audubon, 119 La. 1071, 44 Sou. 891.

(3) This proceeding is *summary*, and all defenses of whatever nature must be filed before or at the time fixed

for trial. Godchaux, 44 A. 255; Matt, 37 A. 845. And the cause is triable in vacation. Matt, 37 A. 843. But trial Judge is vested with discretion in granting delay or further pleas. Godchaux, 44 A. 255; C. P. 756; Police Jury, 16 A. 182.

Trial may be had after two days' notice or citation. Ricou, 47 A. 1370; Ward, 47 A. 1546.

Defendant cannot by his answer, nor can any intervention, change the character of the proceeding to ordinary. Mighell, 51 A. 281. And so where defendant, after receiving the notice to vacate, takes the initiative and enjoins plaintiff from ejecting him, defendant may by his answer show the facts and make the proceedings summary for the ejectment of plaintiff. McMahon, 52 A. 1041. See Campbell, 118 La. 871.

(74F)

Jurisdiction; Preference.

SEC. 2156. Whenever the monthly or yearly rent paid by the tenant, or the lease which he shall allege to hold, shall exceed the sum of one hundred dollars, then the summary proceedings allowed by the preceding section for the possession of leased property, shall be instituted and carried on before any parish or district court having competent jurisdiction, in the manner provided by the preceding section, and the cases shall at all times be tried by preference, after three days notice (Act 284, 1855, 344.)

(1) Now triable after two days' notice by the effect of the preceding section.

(2) The jurisdiction of the court is determined by the amount of the yearly or monthly rent, as the case may be. Lauga, 127 La. 542, 53 Sou. 856; Ward, 47 A. 1546, 18 Sou. 508; Campbell, 118 La. 871, 43 Sou. 533; Godchaux, 44 A. 256.

But we submit that the amount of monthly or yearly rental should determine the jurisdiction only in those cases where the lease has expired, or has only another

year or another month to run, as the case may be. Where the ejectment is sought on the ground of violation of the contract of lease, we submit that the jurisdictional amount should be the rental for the unexpired portion of the term of the lease.

(3) The jurisdictional amount may be proved, even though not alleged. *Godchaux*, 44 A. 258, 10 Sou. 674.

(74G)

Appeal.

SEC. 2157. No appeal from any such judgment shall suspend execution unless the defendant has filed a special defense, supported by his oath, that all the facts contained in his answer are true, and entitle him to retain the possession of the premises, and unless further, he give bond with good and sufficient security for all such damages as the appellee may sustain.

(1) Unless the conditions imposed by this section have been complied with, the Judge has no authority to grant a suspensive appeal; and, if such is granted inadvertently, it does not divest his court of jurisdiction. *Audubon*, 119 La. 1070, 44 Sou. 891; *Lamouraine*, 45 A. 1816, 14 Sou. 282.

(2) The amount of the bond to be given for suspensive appeal is governed by this section, and not by Art. 577, C. P.; and the amount is to be fixed by the trial Judge. *Werlein*, 110 La. 1042, 35 Sou. 282; *Audubon*, 119 La. 1071, 44 Sou. 891.

(74H)

These Sections Shall Apply to Sub-Lessee.

SEC. 2158. It shall be lawful for any lessor to make use of the provisions of the foregoing sections against any underlessee or tenant whom he may find in possession of the premises by him so leased.

Audubon, 120 La. 1090, 46 Sou. 33.

(74I)**These Provisions Do Not Affect Other Actons.**

SEC. 2159. Nothing herein contained shall be so construed as to deprive any landlord or lessor of any remedy heretofore allowed him either for the payment of the rent to him due, or for the seizure of such part of the furniture found on the premises so leased as is allowed by law.

(1) Therefore, the lessor may bring this action for the ejectment of the tenant on the ground of non-payment of rent when due under the lease, and at the same time bring suit for the amount of rent due, and therein provisionally seize property on which he has privilege for rent.

(74J)**Preference in Supreme Court.**

SEC. 2163. All suits for the expulsion of tenants, brought in pursuance to the provisions of this act shall at all times be tried by preference in the Supreme Court of this State, any law or laws to the contrary notwithstanding. (Act 39, 1866, 68.)

(1) This section is repealed by the effect of Act 70 of 1884, p. 93; but the Court will, in the discretion vested by this act, consider the policy of the law, and, in a proper case, fix it for trial by preference. *Godchaux*, 44 A. 253, 254, 10 Sou. 674.

Author's § 9.)**(74K)****Of the Action of Boundary.**

This is a separate and distinct real action, but the law-makers have seen fit to treat it entirely in the Civil Code rather than in the Code of Practice. Its discussion, therefore, more properly belongs to a work on the Civil Code.

See R. C. C., Book II, Title V, Art. 823 et seq.

(Author's § 10.)

(74L)

Of the Proceeding by Monition.

This is a proceeding by which the purchaser, or one claiming through the purchaser at a sheriff's or other public sale, may proceed, as it were, against the world, to have the title acquired by such sale confirmed and set at rest from attack.

This proceeding is provided by Sections 2370 to 2380, inclusive, of the Revised Statutes of 1870. It is now little used, and we do not feel that we would be justified in reproducing these sections in this work. The student may refer to them and to cases cited in Marr's Annotated Revised Statutes, p. 1643 et seq.

(1) The opponent in such proceeding is in no case required to make a tender as a condition precedent to his opposition. Fazende, 35 A. 1145.

(2) A judgment rendered in such a proceeding, cannot cure a radical defect or nullity in a public sale; Fix, 30 A. 175.

(3) By Section 2380, these provisions of these sections are extended to tax sales; but in so far as tax titles are concerned the proceedings are now governed by Act 101 of 1898, which provides for this purpose, and which is the subject of the next sub-section.

(Author's § 11.)

(74M)

Of the Proceeding to Quiet Tax Titles.

Act 101 of 1898 p. 127.

AN ACT to provide a manner of notice and form of proceeding to quiet Tax Titles in accordance with Article 233, of the Constitution.

SECTION 1. *Be it enacted by the General Assembly of*

the State of Louisiana, That the manner of notice and form of proceeding to quiet Tax Titles in accordance with Article 233, of the Constitution, shall be as follows:

After the lapse of twelve months from the date of recording the tax deed, in the conveyance records of the Parish where such property is situated, the purchaser, his heirs or assigns, may institute suit by petition and citation as in ordinary actions, against the former proprietor or proprietors of the property in which the petition must appear a description of the property, mention of the time and place of the sale and name of officer who made same. reference to page of record book and date of record tax deed, notice that petitioner is owner of the said property by virtue of said tax sale, and notice that the title will be confirmed unless a proceeding to annul is instituted within six months from date of service of the petition and citation. This suit shall be brought in the parish where the property is situated unless it lies in two or more parishes, in which case this suit may be instituted in either of such parishes. The petition and citation shall be served as in ordinary suits; provided that if the former proprietor be a non resident of the state, or unknown, or his residence be unknown, the Court shall appoint a Curator ad hoc to represent him and receive service, and said Curator shall receive for his services not more than ten dollars, same to be taxed as costs of suit. After the lapse of six months for service of petition and citation, if no proceeding to annul the sale has been instituted, judgment shall be rendered quieting and confirming the title.

(1) History of, and reason, for this act. Roussel, 132 La. 397.

(2) This proceeding is not designed to test the title as among all parties in interest, but merely to test the tax title. Therefore the Curator ad hoc represents the owner

on no other issue than the validity vel non of the tax sale; nor can he litigate with any other than the tax purchaser, his heirs, or assigns. Therefore, if the tax sale is declared invalid, nothing stands adjudicated among claimants, other than the tax purchaser. Folger, 130 La. 1082, 58 Sou. 890. And the issue is limited to the tax-title, Fitzmaurice, 134 La. 164, 172.

(3) But where this proceeding is properly brought, the proper parties made, or caused to be legally represented, a judgment duly obtained, confirming the tax title, confers upon the purchaser a title good against the world, and not subject to attack from any source. Roussel, 132 La. 393, 398, overruling prior opinion, p. 388; Clayton, 128 La. 103, 54 Sou. 486; Lisso, 114 La. 392, 38 Sou. 282.

(4) It must be remembered, however, that if the tax deed does not contain a description sufficient to identify the property, it conveys nothing, and if the tax title is confirmed giving the same insufficient description, the confirmation can have no effect. Nothing was sold and nothing was confirmed. The confirmation in such a case adds nothing to the title. But a description, sufficient to identify, may be corrected and made more certain, in the confirmation proceeding. Roussel, 132 La. 391, 393; overruling prior opinion, p. 389. See Xeter, 135 La. 976; Brock, 136 La. 903.

(5) One whose title has been divested by a valid tax sale, has no interest to contest the validity of the sale from the tax purchaser to the plaintiff. Quaker, 131 La. 997, 60 Sou. 661.

And where defendant, has in bad faith, with mere pretense of title, taken possession since the tax sale, with knowledge thereof, he has no standing to sue for the nullity of the tax sale. Lisso, 114 La. 392, 38 Sou. 282.

But see note 9 to Article 43; note 2 to Article 44.

(6) This suit must be brought against the real party in interest, the former owner, although the property may have been erroneously assessed to another who claims no interest. Slattery, 114 La. 282, 38 Sou. 170. And owner must be sued in his proper name. Xeter, 135 La. 977, 979.

(7) Plaintiff need not allege either possession in himself, or want of possession in defendant. Slattery, *supra*.

(8) The proceeding to annul must be instituted within six months from the service of the petition and citation herein. If brought after the six months, it is too late and the tax sale will be confirmed. Ashley, 109 La. 641, 648.

(9) It seems that the Curator ad hoc may claim \$10.00 for each defendant that he represents. Quaker, 122 La. 43, 47 Sou. 369.

(74N)

Joinder of Former Owners of Separate Tracts.

SEC. 2. *Be it further enacted, etc.,* That in actions to quiet tax titles as above set out, two or more former proprietors of separate tracts who have no privity community of interest, may, at the option of the purchaser of said tracts, be joined and brought into court in one and the same suit.

(1) This has been done, and apparently sanctioned. Pitre, 110 La. 235.

(740)

Where Title Quieted by Three Years.

SEC. 3. *Be it further enacted, etc.,* That in all cases where tax titles have been quieted by prescription of three years, as set out in said Article 233, the purchaser or his assignee may, if he so desires, obtain a judgment of the court confirming said title, same to be done by suit in the manner and form as above set out, except that the delay for answer shall be ten days instead of six months; provided that the failure to bring said suit shall in no manner affect said prescriptive titles.

(1) Under this section, the answer will be in time, although filed after the ten days, if filed before default. Ashley, 109 La. 641, 648.

(2) To maintain the action under this section the title must have been quieted by the prescription of three years, and as this is impossible where the tax debtor has remained in actual possession, it follows that the action under this section cannot be maintained against a defendant who has so remained in possession. Seim, 111 La. 562.

(3) Defendant must set up in his answer all the grounds on which he intends to rely to avoid the tax title. Quaker, 127 La. 215. No additional grounds can be set up, after case is remanded for a restricted purpose. Id., p. 208, 53 Sou. 526.

SEC. 4. *Be it further enacted, etc.,* That all laws and parts of laws in conflict with this act are hereby repealed.

(Author's § 12.)

(74P)

Of the Action for the Compulsory Transfer of Property, or Expropriation.

This action is nearly always a Real Action because real estate is nearly always the subject-matter.

It, however, belongs to the Civil Code, and will not be treated here.

See Revised Civil Code, Book III, Title VII, Chapter 11, Arts. 2626 to 2641, inclusive.

Revised Statutes, Secs. 1479 to 1493, inclusive. (Sec. 1479 now stands as amended by Act 123 of 1910, p. 194.) Constitution, Arts. 166, 167.

For Street, Urban or Interurban Electric Railways; Act 80, 1908, p. 94.

Jury Fees, Act 101 of 1908, p. 159.

For Pipe Line Companies for Oil or Gas; Act 39 of 1906, p. 54.

For Switches or Spurs Crossing Other Railroad Tracks; Act 267 of 1910, p. 464.

Certain Expropriation suits may be tried in vacation;

Act 132 of 1890, p. 174. This act, however, no longer applies to Orleans. Morgan's, 109 La. 8, 83 Sou. 49.

For Irrigation, Transportation and Hydro-Electric Companies; Act 157, 1914, p. 278.

(Author's § 13.)

(74Q)

Of the Action for Partition of Property.

The Action for Partition is usually a Real Action, as it is usually brought for the partition of real property. It belongs to the Civil Code.

See Revised Civil Code, Book III, Title I, Chapter 12; Arts. 1289 to 1414, inclusive.

(Author's § 14.)

(74R)

Of the Wife's Action for Separation of Her Property from That of Her Husband.

See Revised Civil Code, Book III, Title VI, Chapter 4; Arts. 2425 to 2437, inclusive.

CHAPTER IV.

**Where Actions Are to Be Brought, and in
What Manner.**

Art. 75. Actions must be brought before competent judges.

West, 115 La. 218.

SECTION 1.**Of Judges; Their Jurisdiction; How Their Competency Is Regulated.****Jurisdiction, Definition.**

Art. 76. Jurisdiction means the power of him who has the right of judging, or sometimes that word means also the space or extent of country over which the judge is entitled to exercise that power.

(1) Schwan, 52 An. 1187; State, 35 A. 1084; Weigel, 17 A. 70; State, 22 A. 570.

(2) Where an order may be signed by a judge at chambers on an ex parte application, he may sign the same outside of his district. Weigel, 17 A. 70. But see Halphen, 38 A. 724, 727.

(3) A judge may, proprio motu, entertain an inquiry into an abuse of legal proceedings in his court. Gates, 8 A. 277.

(4) The title of the person sitting as judge, to the office, cannot be attacked collaterally in any proceeding pending before him. Williams, 35 A. 742; Pertsdorf, 33 A. 1411; Sadler, 51 A. 1397.

And the incapacity of a judge ad hoc, must be urged in limine. If urged only after judgment, the judgment will stand as that of a de facto officer. Guilbeau, 32 A. 931; Davis, 120 La. 165.

Degrees of Jurisdiction.

Art. 77. Degrees of jurisdiction means the different tribunals before which the same suit may be successively pleaded, and the rules established for proceeding in an inferior jurisdiction previous to taking the suit before a superior jurisdiction.

Several Kinds.

Art. 78. There are several kinds of jurisdiction, ac-

according to the nature and extent of the powers delegated to the judge exercising it.

First Division: Civil and Criminal.

Art. 79. The first division is into civil and criminal jurisdiction.

Scope of Each.

Art. 80. Civil jurisdiction extends to all civil matters, and criminal jurisdiction comprises whatever relates to crimes and misdemeanors.

C. P. Arts. 8, 9, 10.

(1) See note to Art. 10, as to forfeiture of appearance bond. The jurisdiction, of course, follows the kind of action.

(2) Justices of the Peace have no jurisdiction to try and determine criminal cases. But they may entertain civil proceedings in certain cases to collect, penalties, forfeitures or fines due the State. Long, 44 A. 949, 11 Sou. 588. Sec. 2053, R. S., confers only civil jurisdiction. Nunez, 45 A. 207. See Parish, 45 A. 1091; Scarborough, 43 A. 1164.

Second Division: General and Special.

Art. 81. Some judges exercise general, whilst others possess only special jurisdiction.

Judges having general jurisdiction are those who, in virtue of the law, take cognizance in all matters but such as are specially excepted from their jurisdiction.

Judges having special jurisdiction are such as have an exclusive jurisdiction in certain cases pointed out by law.

(1) Jurisdiction of Supreme Court; Const. Art. 85.

(2) Jurisdiction of Courts of Appeal; Const. Art. 98.

(3) Jurisdiction of District Courts outside of Orleans; Const. Arts. 109, 111, 115; post under Art. 126.

(4) Jurisdiction of Justices of the Peace; Const. Art. 126.

(5) Jurisdiction of Juvenile Courts; Const. (1913) Art. 118.

(6) Jurisdiction of Court of Appeal for the Parish of Orleans; Const. Art. 131.

(7) Jurisdiction of Civil District Court, Parish of Orleans; Const. Art. 133; printed post, under Art. 126.

(8) Jurisdiction of Criminal District Court, Parish of Orleans; Const. Art. 139.

(9) Jurisdiction of City Criminal Courts, City of New Orleans; Const. Art. 140.

(10) Jurisdiction of First and Second City Courts, City of New Orleans; Const. Arts. 143, 147.

A Third Division: Exclusive and Concurrent.

Art. 82. There are judges having exclusive jurisdiction, such as the special judges mentioned in the preceding article.

Example: Justices of the Peace have exclusive original jurisdiction in suits for less than \$50. Note 4 to Art. 81.

There are judges with concurrent jurisdiction, that is to say, having cognizance in matters of the same nature, though they hold their courts in the same place or district.

Example: Justices of the Peace and District Courts have concurrent original jurisdiction in suits for amounts between \$50 and \$100.

Equal Jurisdiction.

Art. 83. There are judges having equal jurisdiction, that is to say, that though they can only take cognizance of cases arising within a certain space, they have a similar jurisdiction as to the nature of cases which may be brought before them.

Example: Equal as to nature of cases, the several District Courts. Equal in space as well, two district judges for the same district, e. g. the 21st.

A Fourth Division: Original and Appellate.

Art. 84. There are judges of original and judges of appellate jurisdiction.

Judges having original jurisdiction are those before whom suits are brought in the first instance.

Examples: District judges, justices of the peace.

Judges having appellate jurisdiction are those before whom appeals are brought by those who complain of the judgment of the court of the first instance, and who try the cause again, affirming or reversing the judgment of the inferior court.

Examples: The Supreme Court, the Courts of Appeal.

A Fifth Division: Subject to Appeal and Final.

Art. 85. The decision of some judges is subject to appeal; others decide in the last resort.

Judges subject to appeal are those whose decisions may be carried by appeal before a superior court having appellate jurisdiction.

Examples: Justices of the peace; and district judges in cases where they have exclusive original jurisdiction.

Judges in the last resort are those whose judgment cannot be appealed from.

Examples: The Supreme Court, and the Courts of Appeal.

(1) This division takes no account of the supervisory powers of superior courts over inferior, exercised by writs of review, certiorari, mandamus, prohibition and the like. A discussion of this subject would be out of place here.

There is no court in the land whose decisions are not subject to review in any case whatever, except the Supreme Court of the United States.

Competency.

Art. 86. In matters of jurisdiction, the right given to a judge to take cognizance of certain causes against certain persons within his jurisdiction, is termed *competency*.

Bailey, 120 La. 893, 899; 45 Sou. 932.

(1) "Competency," as here used, seems synonymous with "Jurisdiction."

Tests of Competency.

Art. 87. In order to ascertain whether a judge be competent or not, three points must be taken into consideration:

1. The object or the amount in dispute.
2. The person of the defendant.
3. The place where the action is to be brought.

Iberia, 129 La. 495; Baily, 120 La. 899; Wisdom, 31 A. 55.

(1) Jurisdiction cannot be retroactive. When subsequently acquired, it cannot give validity to any proceedings taken when court had no jurisdiction. Mora, 21 A. 754; Edwards, 28 A. 567.

Jurisdiction as to Object or Amount.

Art. 88. To determine on the competency of a judge, as relates to the object or amount in dispute before him, it is necessary to examine what are his powers, what is the nature of the cause, and what is the amount of the sum.

Bailey, 120 La. 899.

As to Person of Defendant.

Art. 89. To determine his competency, as relates to the person of the defendant, the rule which requires that the defendant be sued at the place of his domicile or usual residence, must be observed. This rule is subject, however, to various exceptions, determined in the chapter which treats of judicial demands and of citations.

C. P. 162 et seq.; Bailey, 120 La. 899; West, 115 La. 218; Escande, 32 A. 283; Spear, 16 A. 8; Logan, 14 A. 300; C. P. 129.

Territorial Jurisdiction.

Art. 90. To determine on his competency, as relates to the place where the action is brought, we must be governed by the rule which provides that a judge shall not exercise any jurisdiction beyond the limits of the territory assigned to him.

(1) C. P. 162; Bailey, 120 La. 900; West, 115 La. 218; C. P. 129.

(2) See note 2 to Art. 76 as to ex parte orders.

(3) But in proceedings ancillary to the main proceeding over which a court has jurisdiction, its jurisdiction extends to persons and property beyond its territorial jurisdiction. And this is extended to a proceeding in rem by attachment, where it has been held that the Court which issues an attachment against a non-resident, may thereafter attach in the same suit other property in other jurisdictions. Kahn, 35 A. 1041. But garnishment under fi. fa. is not such ancillary proceeding, although garnishment under attachment is. Marqueze, 29 A. 194. See note 2 to Art. 154.

Jurisdictional Amount Is the Amount Claimed.

Art. 91. When the jurisdiction of the judge before whom a suit is brought is limited to a certain sum, the

question of jurisdiction must be decided by the amount claimed, and not by the sum actually due, not including, however, the interest and the costs which have been subsequently incurred. (To be concluded.)

(1) All the articles of the Constitution fixing the jurisdictional amounts of the various courts, now fix the amount, "exclusive of interest." See the articles cited under Art. 81 herein. Therefore the interest due at the date of filing suit is no longer included in fixing the amount.

(2) Amount claimed by plaintiff, "exclusive of interest," fixes jurisdiction. Teal, 34 A. 892; Kahn, 35 A. 1039; Baker, 49 A. 874, 876; Lhote, 115 La. 487, 39 Sou. 502; Peyret, 52 A. 1503; Schick, 52 A. 180, 184; Art. 126, note 5.

(3) But where after filing petition, plaintiff admits having received on account a sum which reduces the amount claimed below the jurisdiction of the Court; or the defendant answers admitting part of the amount claimed, so that the amount in dispute is below the Court's jurisdiction, the Court will dismiss the case, or, where allowed by law, transfer it to the proper court. Denegre, 35 A. 346; Guidry, 41 A. 756, 6 Sou. 563; Boyet, 42 An. 982, 8 Sou. 468; Beauvais, 48 A. 672, 676; Begg, 125 La. 804, 51 Sou. 905.

But this question is to be tested by the pleadings which make the issue, and not by any evidence received. Landeche, 37 A. 836; Miller, 36 A. 201; Hardeman, 138 La. —, 70 Sou. 53, 55.

And where the defendant admits an amount which would leave the amount in dispute below the jurisdiction of the Supreme Court, but nevertheless the lower court renders judgment rejecting the entire claim, the Supreme Court has jurisdiction. Foster, 51 A. 1671, 1679.

(4) Attorney's fees, claimed by plaintiff, constitute part of the jurisdictional amount. Foster, 51 A. 1670.

(5) Costs are merely an incident to a suit, and whatever the amount of costs for which any party is condemned, the amount thereof has no effect upon the juris-

diction of the appeal. The jurisdiction as to costs follows the jurisdiction of the demand. Deal, 124 La. 991, 50 Sou. 820; Lambert, 115 La. 470; Begbie, 49 L. R. A. 141, 128 Cal. 154, 60 Pac. 667.

Claiming Less Than Due to Secure Jurisdiction.

But if one, in order to give jurisdiction to a judge, demand a sum below that which is really due to him, he shall be presumed to have remitted the overplus, and after having obtained judgment for the sum he had claimed, he shall lose all right of action for that overplus.

(6) This paragraph is in effect repeated and re-enacted in Article 156, without the restrictive clause, "in order to give jurisdiction to the judge." We will defer all discussion to Article 156.

Consensus Non Facit Jurisdictionem.

Art. 92. The consent of parties cannot render a judge competent to try a cause which, from its nature, cannot be brought before him, or when the amount in dispute exceeds the sum over which he has jurisdiction. All judgments rendered in contravention of this provision shall be void.

C. P. Art. 606, No. 3, Arts. 86, 87, 88.

(1) This article refers only to the test of competency, provided by Article 87, No. 1, and explained in Article 88. No matter how freely the parties consent, a judgment rendered by a court without jurisdiction *ratione materiæ* is null and void. Edwards, 21 A. 610. Such nullity is absolute and may be urged at any time. Hartman, 21 A. 662. And the nullity will be noticed without a direct action to annul. Decuir, 105 La. 481, 484, 485.

(2) The Court will *ex proprio motu*, notice want of jurisdiction *ratione materiæ*, and dismiss. Edwards, 21 A. 611; Rogers, 32 A. 48; Fields, 33 A. 339; Tague, 38 A. 456; Riggs, 39 A. 1030, 3 Sou. 183; State, 48 A. 673.

Want of Jurisdiction *Ratione Personae* Waived, How.

Art. 93. If one be cited before a judge whose jurisdiction does not extend to the place of his domicile, or of his usual residence, but who is competent to decide the cause brought before him, and he plead to the merits, instead of declining the jurisdiction, the judgment given shall be valid, except the defendant be a minor.

(1) The effect of this article is not curtailed by Article 162. Jex, 18 A. 89; Marqueze, 29 A. 195, 196; School, 30 A. 596; Stevenson, 33 A. 658; Stackhouse, 36 A. 531; Atkins, 52 A. 803, 804; Phipps, 31 A. 90, 91; Kelly, 40 A. 498, 4 Sou. 480; Carroll, 43 A. 1194.

(2) It is the pleading to the merit, that gives jurisdiction to the Court, and therefore the exception to the jurisdiction is too late, if filed after any plea to the merits. The jurisdiction has then vested. Furthermore, the jurisdiction vests, if defendant plead to the merits, without insisting upon his plea to the jurisdiction previously filed. Tupery, 32 A. 1146; Ashby, 41 A. 141. And so where the pleas are filed simultaneously, jurisdiction vests. Mix, 39 A. 624, 627; Gomila, 41 A. 118; Atkins, 50 A. 55; Bernstein, 122 La. 412, 415; Iddle, 132 La. 476.

Compare, Cure of Want of Citation by Appearance. Art. 206, notes 8, 9, 10.

(3) But we submit that there is no authority in this article for the proposition that entering a default against defendant vests jurisdiction in the court, where it has none *ratione personæ*. This proposition finds support in two decisions, viz., Phipps, 31 A. 88, and Goodrich, 31 A. 582. The Phipps case holds that a plea to the jurisdiction *ratione personæ* must be filed before default, or it will not be allowed. The Goodrich case declines to decide whether the plea to jurisdiction could be filed after default and before judgment (p. 583), but distinctly holds that where a person is sued as a resident of the parish where suit is brought and is personally cited therein, a judgment regularly confirmed on default will be *res adju-*

dicata against a plea that he resided elsewhere. It is doubtful that even as thus restricted, the proposition will hold. See dissenting opinion of Marr, J., in the latter case, pp. 584 et seq.

It is the pleading to the merit that gives the court jurisdiction, and without an appearance, how does the Court get jurisdiction? Would a judgment by confirmation of default taken in Assumption against "John Smith, a resident of Assumption," be a valid judgment against "John Smith, a resident of Caddo," who never had resided in Assumption?

But see West, 115 La. 213, 218.

Lis Pendens.

Art. 94. The same cause cannot be brought before two separate courts, though they be possessed of concurrent jurisdiction, except by discontinuing the suit first brought before the answer is filed.

Hence, if the same suit be brought before two separate courts, having concurrent jurisdiction, the judge before whom the action was brought first, shall sustain his jurisdiction, and the defendant shall be entitled to have the cause dismissed by the other court, and to recover costs.

Art. 335, No. 2.

(1) Plea must be made in lower court; cannot be first raised on appeal. Townsend, 37 A. 409. And must be specially pleaded in limine. State vs. Reidy, 50 A. 258.

(2) Plea lies only when the second suit has the same object as the first one. Pacific, 41 A. 811, 812; Central, 119 La. 264; Henderson, 119 La. 555.

(3) Plea will be over-ruled where first suit has been terminated, before plea is decided. State, 42 An. 18. And it seems that plaintiff may elect which suit he will prosecute. Id.

(4) Pendency in State Court not ground for abate-

ment of suit upon same matter in a Federal Court. And State Courts will apply the same rule as to matters pending in a Federal court. State, 42 A. 18. But a distinction seems to be made between purely personal actions, and actions affecting particular property. Ferriday, 118 La. 788 et seq. And in proper cases the rule of comity will be observed, and proceedings in the State court, at least, stayed. Ferriday, 118 La. 771, rehearing, 784. See Jennings, 119 La. 864.

(5) There is no legal basis for the plea when the second suit is brought in the same court as the first one. Saint, 126 La. 245, 52 Sou. 474. Nor when first suit is in another State or country. Peyroux, 17 La. 479. Nor on appeal in same suit. Long, 127 La. 8.

Nevertheless, if the defendant, instead of claiming to be dismissed, answer in the two actions, in the two separate courts, the first judgment rendered by either of them shall be valid and executory against the party cast in the action. All proceedings shall be stayed in the other court, and the plaintiff dismissed after paying the costs.

(6) Bourgeois, 45 A. 1310, 1314; Harvin, 112 La. 30; State, 123 La. 864.

SECTION 2.

Of the Mode of Bringing Civil Suits, of Suits and of Parties Litigant.

Suits.

Art. 95. Actions are brought before the Courts by what is termed suits.

Definition of Suit.

Art. 96. A suit is a real, personal, or mixed demand, made before a competent judge, by which the parties pray to obtain their right, and a decision of their disputes.

In that acceptation, the words suit, process, and cause, are almost synonymous.

See Introduction to this Book.

C. P. 2, 3, 4, 7; Starns, 43 A. 307.

Three Kinds of Suits.

Art. 97. Civil actions may be prosecuted, according to the nature of the case, by three kinds of proceedings, to wit:

Ordinary, executory, or summary.

Definitions.

Art. 98. The proceedings are *ordinary* when citation takes place, and all the delays and forms of law are observed.

Jenkins, 12 A. 642.

They are *executory* when seizure is obtained against the property of the debtor, without previous citation, in virtue of an act or title importing confession of judgment, or in other cases provided by law.

C. P. 732 to 753 inclusive, 744, 63, 65, 66, 68 to 74 inclusive.

(1) Via *executiva* and via *ordinaria* cannot be cumulated, or carried on simultaneously. The latter excludes the former. Weimprender, 8 N. S. 95.

Via *executiva* may be changed into via *ordinaria*, and then the first cannot be again resorted to. De Gruy's 2 La. 544, 547; Loeper, 105 La. 783, Carlin, 32 An. 1285.

But plaintiff can change from via *ordinaria* to via *executiva*, only by discontinuing the one suit and bringing the other, and he cannot do this after issue joined. Jenkins, 12 A. 642, 643; Litiolais, 33 A. 1453; Board, 130 La. 1081.

They are *summary* when carried on with rapidity, and without the observance of the formalities required in ordinary cases, as when courts provide for the administration of vacant successions and the property of minors and absent heirs.

C. P. 754 to 757, inclusive.

(2) Such proceedings, in proper cases, are not unconstitutional, and are due process of law. City, 10 A. 764; Bond, 20 A. 139; New Orleans, 11 A. 375; West's, 8 La. 253; Kennard, 25 An. 241.

(3) This form of proceeding is usually called "Proceeding by Rule." It is only allowed in the cases specially provided by law. C. P. 754, 755; Baker, 3 A. 434; Nolan's, 12 A. 202; Sharp, 14 A. 390; Brashear, 29 A. 349; Cushing, 12 A. 430; Jamison, 108 La. 282, 283; May, 105 La. 130; Gary, 120 La. 1030; Meilke, 8 A. 11; Mussina, 12 A. 800; Ledda, 17 A. 317; Soule, 22 A. 79; Weiser, 22 A. 156.

(4) And the law, being in derogation of common right, must be strictly construed, and cannot be extended beyond what is clearly provided. Irwin, 33 A. 64, 76.

And even though the statute provides that certain proceedings be summary, that in itself does not dispense with petition and citation, in all cases. Fischel, 32 A. 704, 708; Mayenno, 32 A. 1123; Schoembs, 33 An. 420; Townsend, 37 A. 114, 117; Block, 39 A. 872.

Two Parties Necessary.

Art. 99. In order to constitute a suit or action, there must be at least two parties present or duly represented, though one of the two may fail to appear; it is therefore that they are called the principal parties to the suit.

Conery, 30 An. 694.

Art. 100. The *Plaintiff* is he who sues another for something which he says is due or belongs to him.

The *Defendant* is one against whom this suit is brought.

Siekman, 136 La. 1068, 1070.

Other Parties.

Art. 101. Besides the plaintiff and defendant, there are often other parties to the suit, such as warrantors, third persons intervening, and parties opposing; but such parties, whether plaintiffs or defendants, as the case may be, are only so incidentally and subsidiarily.

C. P. 363 to 403; inclusive.

CHAPTER 5.

What Persons Are Entitled to Bring Actions.

In General.

Art. 102. Those who are disqualified from contracting are generally disqualified from suing.

The exceptions to this rule are provided in the following articles.

R. C. C. 1782 et seq.

Art. 103. No disqualifications to bring actions can arise on account of race, color, or previous condition.

Children vs. Parents.

Art. 104. *Children*, as long as they are subjected to paternal power, that is to say, while their fathers and mothers are living and they are not emancipated, cannot bring suit against them.

Wife vs. Husband.

Art. 105. A married woman cannot sue her husband as long as the marriage continues, except it be to obtain a separation from bed and board, or for the separation of property, or for the restitution and enjoyment of her paraphernal property, or in case she holds her property separate from him by her marriage contract, or for divorce; but in no case can she sue her husband without the authorization of the court before which she brings her action.

Separation from Bed and Board, and Divorce; R. C. C. 188 to 161, inclusive.

Separation of Property; R. C. C. 2425 to 2437, inclusive.

Restitution of Paraphernal Property; R. C. C. 2391.

When Separate by Marriage Contract; R. C. C. 2392 to 2396, inclusive.

(1) The cases herein enumerated are exclusive. Heyob, 18 A. 41; Moore, 18 A. 614; Smith, 42 A. 1063; Carroll, 42 A. 1073; Suberville, 46 A. 125; Vigourie, 133 La. 415.

(2) Therefore a wife cannot sue for alimony except as incidental to a suit for separation or divorce. Moore, 18 A. 613; Carroll, 42 A. 1071; Suberville, 46 A. 119, 14 Sou. 518; Hart, 104 La. 8; Van Horn, 116 La. 133.

(3) There can be no contract between husband and wife except in the cases allowed by Article 2446 of the Civil Code. Vigourie, 133 La. 410, 415. Burns, 39 A. 378. Therefore a wife, although separate in property cannot advance her husband money to raise a crop, and obtain a lien and privilege on the crop. Vigourie, 133 La. 406, 63 Sou. 89.

She can, however, whether separate in property or not, sue at any time for the restitution of paraphernal funds of property. Joly, 35 A. 806; Hawes, 10 La. 136; Gilbeaux's, 8 N. S. 228; Pecquet, 17 A. 204, 233; Rowley, 19 La. 572. And this without accompanying the demand with

a demand for dissolution of community. Joly, 35 A. 806; Jenkins, 118 La. 130, 42 Sou. 722.

While a note given the wife by the husband, or any other written contract between them, has no validity as a contract, it is evidence that he has received her funds, for the restitution of which she may sue. DeLesdernier, 45 A. 1365, 14 Sou. 191; Burns, 39 A. 378, 1 Sou. 913; Pascal, 48 A. 1228, 20 Sou. 750.

It seems that the action for paraphernal funds cannot be divided, but that the wife must sue for all at one time. Vigourie, 133 La. 413. We submit that no good ground for so holding appears. See Jenkins, 118 La. 130, 131, 42 Sou. 722.

The wife can recover, as her paraphernal property, a debt which her husband owed her before the marriage. Bordes, 52 A. 306, 309. The contrary seems to be held in LeBœuf, 131 La. 148, 59 Sou. 102. Although this latter decision goes no further than to hold that the wife has no legal mortgage to secure such a debt, it puts it on the ground that the property is not paraphernal. But this debt is certainly property, and being property, it is necessarily paraphernal property, because it can be no other kind.

(4) The custody of children is a matter in which the State has an interest, as in other matters in which a writ of habeas corpus may be sued out. Therefore this article does not prohibit such an action on the part of the wife, for the custody of her children. Lasserre, 105 La. 747.

(5) The authorization required by this article is for the husband's benefit, and is designed to protect him from unadvised and vexatious family suits. Therefore, no one except the husband can urge the want of authorization. Jumonville, 27 A. 461; Spivey, 31 A. 653.

Wife vs. Other Than Husband.

Art. 106. A married woman, whether she be of age or a minor, cannot appear in court against any one without the authorization of her husband, although she may be a public merchant, carrying on her trade separate from

him, unless she has obtained a separation from bed and board by virtue of a judgment duly executed, or has been regularly divorced.

R. C. C. 121, 123, 1316, 1664.

(1) The usual and simplest method is to make the husband a co-petitioner and co-plaintiff for the purpose of assisting and authorizing his wife. *Payne*, 25 A. 202; *Lewis*, 109 La. 1035; *Evans*, 24 A. 248; *Jones*, Man. Unrep. 65.

The mere statement by the wife in her petition, that she is joined and assisted by the husband, amounts to nothing without proof of the authorization. *Hayes*, 51 A. 450; *Lewis*, 109 A. 1035; *Sommers*, 25 A. 193; *Hatcher*, 23 A. 136; *Pomeroy*, 21 A. 576.

(2) The authorization may be supplied at any time before trial on the merits. *C. P.* 320, 321; *McDonald*, 26 A. 590.

And the appearance of the husband through an attorney for this purpose will suffice. *Howard*, 10 A. 504, 505.

Or the husband's written consent filed. *Salvant*, 24 A. 316.

Or any proof of the fact will suffice. *Pomeroy*, 21 A. 576. As, where injunction is the object of suit and the injunction bond is signed by husband. *Lewis*, 26 A. 708. Attending the trial and participation therein. *Fairex*, 37 A. 823.

Where plaintiff married after bringing suit. *Flynn*, 21 A. 168.

(3) If the wife's petition states that she is authorized by her husband, and it is not excepted to or denied before judgment, it cannot afterwards be raised that wife was not authorized. *Durham*, 30 A. 1255, 1257; *Taylor*, 21 A. 665.

(4) The wife cannot take an appeal without authorization. *Gibson*, 35 A. 1201; *Bray*, 2 A. 879; *Allen*, 7 A. 650; *Gorman*, 1 R. 230; *Gorman*, 1 R. 468; *Jurey*, *Manning*, 52.

But where the wife has been duly authorized to bring and prosecute the suit, no further authorization for ap-

peal is necessary. DeBlanc, 26 A. 541. His joining her in the petition for appeal is sufficient. Boutte, 30 A. 177. Or his signing of her appeal bond sufficiently shows his authorization. Fairex, 37 A. 823; overruling Stokes, 22 A. 204. And see Lemeunier, 37 A. 133; Barnabe, 16 A. 84; Hill, 10 A. 554.

(5) If the husband refuses his authorization, the Court may authorize her. R. C. C. 124. Likewise, if the husband is absent or under interdiction. R. C. C. 132.

Except in these cases the Judge cannot authorize her. Saunders, 38 A. 367, 369.

But where the authorization of the Court appears, with out any showing that husband had refused, or was absent or disabled, it will be presumed that the authorization by the Court was proper. Jemison, 24 A. 172; Williams, 52 A. 1442. And the Court may authorize her at any time before trial. Cartright, 125 La. 700, 702. The trial judge is the one to authorize. Blake, 29 A. 245, 252.

When Husband May Sue for Wife.

Art. 107. Husbands have under their control the personal and possessory actions to which their wives are entitled, though they be themselves minors; therefore they can proceed judicially, and in their own name, in whatever relates to the preservation of the dotal property which their wives have brought to them by marriage, as well as to the recovering of the debts due them, these being under their administration.

But actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge if he fails to do it.

(1) Where the husband sues to protect his wife's interest, his allegations must show such to be the case. Vigourie, 121 La. 107.

(2) Act 68 of 1902, p. 95, amending C. C. 2402, provides that damages resulting from personal injuries to the

wife shall be recoverable by her alone. It has therefore since been held that such suits should be brought solely by the wife duly authorized; but it has also been held that, where the suit is improperly brought in the husband's name or in the name of both, and the wife's acquiescence is shown in any way, the suit will not be dismissed, but the judgment rendered in plaintiff's favor will be declared to be the separate property of the wife. *Martin*, 116 La. 495, 40 Sou. 849; *Harkness*, 110 La. 822, 34 Sou. 791.

But prior to the act of 1902, such actions were properly brought by the husband, although it did not destroy the action to join the wife. *Martin*, 116 La. 498, and cases there cited.

The *Shields* case, 132 La. 774, 776, announces a doctrine to which we cannot yield assent. It holds that in suits under this act, the wife does not need the authorization of her husband. This is put upon the ground that the act provides that the damages are "recoverable by herself alone." Surely, these words mean no more, can have no other office than to stress the fact that such damages are the separate property of the wife, and not community. They do not change the law regarding the manner of bringing suit by the wife. The doctrine in this respect is, to our mind, correctly laid down in the *Martin & Harkness* cases, *supra*.

(3) It is somewhat out of place, under this article, to remind the student that the wife has no control over community property; that the husband is its head and master, and all actions relating thereto must be brought by him.

This article refers only to actions regarding the separate property of the wife, whether dotal or paraphernal.

In *Holmes*, 9 La. 350, 351, the natural interpretation is given to this article. *Bullard, J.*, there holds that all personal and possessory actions of the wife must be brought by the husband in his name, while real actions to determine ownership must be brought by the wife, duly authorized. *Pecquet*, 17 A. 204; *Barus*, 23 A. 296.

In *Cowand*, 9 A. 12, the French text of this article is consulted. The clause "these being under their administration," appeared in the French text, "*qui tombent sous leur administration*," and it is there held that the husband can bring the personal and possessory actions of the wife

only when he has the administration of her estate. In this Cowand case the wife, authorized by the judge, brought a personal action for debt, and she was non-suited because she had not alleged or shown that she had the administration. In Morton, 25 A. 593, it was held that the fact that the husband brought the suit sufficiently showed that he was administering.

(4) This article simply permits the husband to sue in his own name in proper cases. He may still authorize his wife to sue if he wishes, and the suit will stand, because his authorization concludes him. Lapice, 21 A. 226, 228; Evans, 24 A. 249.

And in a doubtful case it is safe to make both spouses plaintiffs, as defendant is without interest to urge that the claim belongs to either in particular. Lewis, 109 La. 1030, 1035.

Minors, Interdicts, and Absentees.

Art. 108. Minors, persons interdicted or absent, cannot sue, except through the intervention or with the assistance of their tutors or curators.

(1) Fathers and mothers may, as long as their children are under their authority, appear for them in any civil suit. R. C. C. 235.

And where the father is absent, has disappeared, or abandoned the matrimonial domicile, the mother may sue for the minor. R. C. C. 81; Williams, 52 A. 1417, 1418, 1442.

(2) After the death of either spouse, the father or mother surviving must be appointed tutor or tutrix by the Court, and must qualify as such. C. P. 949, 950; Fisk, 2 A. 71, 76.

But it seems that even before such appointment, the surviving parent may sue for the minor child. He cannot receive property or money belonging to the minor, but can sue to liquidate claims, preserve property, have money brought into court and invested. Fisk, 2 A. 71, 77; Varnado, 113 La. 72, 78.

. And after bringing suit as surviving father or mother,

for the use and benefit of minor child, the parent may qualify as tutor, and have himself made party to the suit, or substituted as plaintiff in that capacity, and judgment afterwards rendered in his favor as tutor will be valid. Delisle, 105 La. 77, 79; Creagh, 128 La. 306, 313.

(3) The under-tutor sues for the minor, when the minor's interest is in opposition to that of his tutor, and only in that case. R. C. C. 275; Netter, 26 A. 458, 460; Ashby, 41 A. 139, 142; Fortier, 31 A. 50, 51; McEnery, 23 A. 617.

(4) No person, however near of kin, can sue for the minor, except the parent or parents, tutor or under-tutor, as in notes 1, 2 and 3 above, and in 5 and 6 post.

When the object is to remove the tutor for cause, the under-tutor must notify the judge of the necessity, and the judge must direct the action. When the object is to remove the under-tutor for cause, any person may acquaint the judge with the necessity, and the judge must appoint a curator ad hoc to commence the action. C. P. 1015, 1016; Conery, 110 La. 996, and cases there cited. But, tutor may also sue to remove under-tutor for cause. Fraser, 29 A. 634, 635.

(5) When minor has no tutor, and emergency requires immediate action, a tutor ad hoc will be appointed and qualified to act until tutor can be appointed and qualified. Fortier, 31 A. 50, 51. And it matters not if an additional name as "special curator" be given him in the appointment. Keenan, 34 A. 885; Petrie, 3 A. 562.

(6) A foreign guardian can sue here for minor residing anywhere in the United States. R. C. C. 363; James, 41 A. 1103.

How Tutors and Curators Sue.

Art. 109. Tutors act themselves, in all judicial proceedings, in the name of their minors, and in all suits which may be brought for them, without making them parties to said suits.

The curators of persons, interdicted or absent, act ju-

dicially in the name of those they represent, in the same manner as tutors of minors.

(1) Tutor represents minor completely, and judgment completely binds the minor. Martel, 15 A. 598; Heroman, 34 A. 805, 813; Barrow, 38 A. 645, 650; Begue, 112 La. 1048; McWilliams, 15 A. 88.

Minor Husband.

Art. 110. The minor husband emancipated by marriage can bring suit without the assistance of any curator.

(1) Therefore, parents have no standing in court to sue even for the nullity of the marriage of a minor son emancipated by marriage. Until the marriage is annulled the status stands, and the son must sue in his own name. Otherwise, if the marriage were absolutely null. Delpit, 51 A. 923, 926.

Curators of Vacant Successions and Absent Heirs.

Art. 111. The curators of vacant successions, or of absent heirs, may bring all kinds of actions relating to their administration in their own name and in their quality, without being obliged to mention the name of the heirs they represent, because it is often uncertain whether such heirs exist, and their names are generally unknown.

(1) Therefore, a judicial partition will not be annulled because the heir supposed to be absent was dead at the time of the proceedings, and his former interest was represented by a curator. Tell, 122 La. 1040, 1045.

(2) Such curators have full powers to sue for, recover and receive. Johnston, 1 A. 75, 77; Dolhonde, 32 A. 251.

How Corporations Proceed.

Art. 112. Bodies corporate and chartered institutions act judicially through their proper representatives under the name or title given to them in the act of incorporation.

(1) This article discussed and construed. Terminal Co., 113 La. 736 et seq. The proper method is to make the petition that of the corporation itself without naming the president or any other officer. Prior cases are reviewed, and Lacaze & Reine, 46 A. 239 is overruled. p. 738. To the same effect, Act 267, 1914, Sec. 7 (c), p. 525.

(2) Where it is alleged that the corporation appears and sues through its president, the authority of the president will have to be proved. Jeannerette, 123 La. 162, citing Hoffpauir, 38 A. 704.

Where the suit is brought in the name of the corporation alone, it suffices to prove that it was brought by authority of the board of directors. Jeannerette, 123 La. 162, citing Insurance, 33 A. 946. We opine, however, that where the authority is not specially denied or put at issue, it need not be proved.

The foregoing portion of this note was written before the promulgation of Act 267 of 1914. Section 16 of said act, p. 527, sets at rest the questions discussed in this note. This section is so important, and applicable in this connection that we here print it in full.

SECTION 16. *Be it further enacted, etc.,* That the president, vice-president or manager of any corporation organized under the laws of Louisiana, or of a foreign corporation, doing business in this State, shall have power in the name and in behalf of the corporation to authorize the institution of any suit and other legal proceedings, and no exception of want of authority shall lie on the part of any defendant. They shall have authority to direct the issuance of conservatory writs; the bonding of property in custodia legis, without other general or special power from the board of directors of such corporation. Such person, or persons, are also authorized by and on behalf of said corporation to execute in its name any bond,

or bonds, in connection with any legal proceedings where it is a party plaintiff, defendant, intervenor, third opponent or otherwise interested, and to make any affidavit required by law or the rules of the court; and such acts by the person, or persons, designated in this section, shall have the same force and effect as the act of the corporation itself and be binding upon it; provided, however, that the authority and powers herein conferred upon said officers may be modified, limited or denied to them by the charter or by-laws of the corporation or by resolution of the board of directors. Such by-laws or resolution to effect the purpose must, however, be placed of record at the domicile of the corporation in the office where the charter is recorded.

It will therefore be observed that the person who brings the suit must bring it in the name of the corporation, and he need not use his own name at all; and where the suit is brought by the president, vice-president or manager, the authority to bring it cannot be questioned by any defendant, unless denial or limitation of such authority has been placed of record by the corporation.

(3) A suit for the corporation cannot be brought in the name of all stockholders together, and this is true even where a single person owns all the stock. *Mioton*, 132 La. 730, 736; see *Levert*, 135 La. 930, 932.

(4) An association of persons, unless organized as a corporation in strict accordance with law, cannot sue as such, but the members must sue as individuals. *Workingmen's*, 29 A. 369; *Vredenberg*, 33 A. 636; *Workingmen's*, 33 A. 963. But it will be permitted to amend its petition so as to make it that of the individuals. *Congregation*, 34 A. 533. See also *Glen*, 35 A. 876; *Hincks*, 37 A. 486; *Williams*, 47 A. 1076, 1081; *Sentell*, 48 A. 1215, 20 A. 732.

But one who has contracted with an association or company as a corporation, is estopped to deny the corporate existence when sued upon his contract. *Latiolais*, 33 A. 1444, 1449; *American*, 46 A. 1118, 1123; *Blanc*, 114 La. 739, 741.

(5) After dissolution, in any manner whatever, a corporation cannot, of course, maintain any appearance what-

ever in court, in its own name; but its liquidators may appear as such, and they are not required to give their own names. President, 35 A. 427. But it has been held that the liquidator may use the name of the corporation in suing. Bank, 6 A. 542. But see Bank, 19 A. 1.

Right of Action Passes to Heirs.

Art. 113. As the right of action may be transmitted, it passes to the heirs; therefore the heirs of the deceased may sue the debtor of the succession in the same manner as the deceased himself could have done.

But, actions being divisible, if there be several heirs, each may sue for his separate share in the same manner as each is only bound, *pro rata*, of his share for the debts of the succession.

C. P. Arts. 22, 23, 24, 21.

R. C. C. Arts. 945, 871, 872, 874, 884.

(1) One heir may sue a stranger for his share of succession property, without making his co-heirs parties. Le Bleu, 46 A. 1465, 16 Sou. 501.

(2) This article makes no exception to the heritability of actions. It serves but to intensify the writer's belief, that, prior to the amendments to Art. 2315 (2294) of the Civil Code, all actions were heritable, whether personal or not, whether *ex contractu* or *ex delicto*.

See note to Art. 23; note 4 to Art. 25; note 1 to Art. 22; note 3 to Art. 21.

CHAPTER VI.

Against Whom Actions May Be Brought. Against Minor Husbands.

Art. 114. Civil actions may be brought against minor husbands emancipated by marriage.

Against Other Minors, and Against Interdicts.

Art. 115. Actions against interdicted persons or minors, must be brought directly against the tutor of the minor or the curator of the interdicted person.

(1) A judgment against an unrepresented minor is an absolute nullity, and such nullity can be asserted collaterally. Johnson, 124 La. 146, and cases cited.

But judgment against tutor is binding on minor unless fraudulent. See Note to Art. 109.

(2) Until confirmation and oath as tutrix, the mother cannot represent minor whose father is dead. Petrie, 3 A. 562, 563. But see Note 2 to Art. 108.

(3) An action cannot be brought against a tutor who has left the State permanently, and acquired domicile elsewhere. Cass, 42 A. 381, 383.

(4) See Note (1) to Art. 117.

Against Unrepresented Minor or Absentee.

Art. 116. If the minor against whom one intends to institute a suit has no tutor, the plaintiff must demand that a curator ad hoc be named to defend the suit. The same course must be pursued if the person intended to be sued be absent and not represented in the State, *or, in partition or expropriation suits, if it be made to appear by affidavit that the residence of the defendant is unknown to plaintiff.*

See also
Act
194
1918
p. 460

(1) Italicized part added by Act 190 of 1904, p. 424.

(2) C. P. 964, as amended by Act 308 of 1910, p. 525; C. P. 737; R. C. C. 56, 145, 313, 222; C. P. 195.

(3) Divorce or separation proceedings against absent party. Act 296, 1910, p. 499. See note 17, C, *infra*.

(4) The mother may be appointed and act as tutrix ad hoc where she has never qualified as tutrix. Chevalley, 115 La. 408, 39 Sou. 113. And the father. Theus, 51 A. 1655.

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(5) It matters not that the person appointed to represent the minor or absentee is styled "special curator" instead of curator ad hoc. Sallier, 108 La. 378, 380; Cavaas, 44 A. 683, 689; Keenan, 34 A. 885. Or "attorney ad hoc." Bienvenu, 33 A. 209, 211; Jacobs, 134 La. 393.

(6) Where plaintiff dies after having obtained a judgment against defendant, defendant may have a curator ad hoc appointed to the minor heirs of plaintiff for the purpose of prosecuting appeal. Theus, 49 A. 1650, 1657.

(7) An attorney appointed to represent absent heirs can represent absentees only in the cases specially provided by law. In partition and like suits against absent heirs, this article must be followed. Gibbs, 47 A. 766, 17 Sou. 291.

(8) Definition of absentee. R. C. C. 3556, No. 3; Bartlett, 31 A. 540; Samory, 19 A. 333; Lasere, 21 A. 205, 207; Dixey, 23 A. 426; Morris, 30 A. 878; State, 16 A. 390; Dreville, 18 A. 695; Tell, 122 La. 1044; Gouner, 123 La. 964; Savant, 136 La. 248, 251; Whitney, 136 La. 233.

(9) A plaintiff is not supposed to know the extent of authority which an agent of an absentee possesses. Therefore, appointment of curator ad hoc is regular, and the agent can come forward at any time, show his authority, and substitute the curator. Taylor, 18 A. 656.

(10) The appointment of curator ad hoc can be validly made only by the court which has jurisdiction of the suit. Bussy, 30 A. 25; Cavaroc, 28 A. 587; Harrod, 10 M. 16.

(11) The same person may represent several heirs, present or absent, in partition proceedings. There is no conflict of interest. Fly, 37 A. 667, 671. But see Crawford, 46 A. 1264.

Duties.

(12) A curator ad hoc cannot waive or abandon any right whatever of his ward; and if he does so, or fails to object, the omission may be noticed and corrected, for the first time, on appeal. Hyde, 10 R. 387; Herman, 11

A. 71; Kraeutler, 12 R. 461; Clacor, 5 A. 499; Story, 14 A. 76; Carpenter, 12 R. 540; Bienvenu, 33 A. 209.

Citation.

(13) Therefore, he cannot waive citation or service of petition. Hill, 6 R. 142; Roubieu, 23 A. 214; Ticknor, 28 A. 258; Cormier, 33 A. 1161, 1170; Vick, 47 A. 45; Jacobs, 134 La. 389.

But it has been held that he may validly acknowledge in writing that petition and citation have been served on him, and that such acknowledgment will be binding. Bartlett, 31 A. 540; Millaudon, 2 A. 916; Fly, 37 A. 667, 671.

Some decisions go so far as to hold that service of citation and petition upon the curator ad hoc is the foundation of his right to act in that capacity; and until such service no act of his is valid. Hill, 6 R. 142; Carpenter, 12 R. 540. And the citation must be addressed to him in his official character. Galoche, 18 A. 481; McDonald, 13 A. 405. But where he is appointed to represent absent heir of party who died pendente lite, citation to him eo nomine not required. Zuberbier, 34 A. 1048.

Where curator waives citation, judgment absolutely null. Jacobs, 134 La. 389, 64 Sou. 150.

Oath of Office.

(14) It seems well settled that a curator ad hoc appointed under this article need not take oath. Woolverton, 52 A. 1152, and cases there cited.

Fee.

(15) The fee of the curator appointed under this article is fixed contradictorily by the Court. State, 30 A. 1027; Bowie, 33 A. 345.

Liability for Acts.

(16) The minor or absentee cannot be held liable for the illegal acts of the curator ad hoc. Nor can the curator be, if he acted conscientiously. Cobb, 30 A. 1228.

Limitation of This Article as to Absentees.

(17) It must be carefully borne in mind that an absent defendant cannot be *personally* subjected to the jurisdiction of the Court by any such substituted process as is

provided for in this article. This has never been doubted since the leading case of *Pennoyer vs. Neff*, 95 U. S. 714, 24 L. Ed. 565. Therefore, a purely personal action (C. P. 3, 26 et seq.) cannot be maintained against an absentee upon the substituted service provided by this article, and any personal judgment rendered thereon will be null and void. Of course, a legal service may be made upon the defendant, where possible, within the State (C. P., Art. 165, No. 5); or the defendant may voluntarily appear, and thus submit himself to the jurisdiction of the Court (*Andrews*, 125 La. 217; *Gates*, 46 A. 297); but, except in such cases, it may be said that our courts have no jurisdiction against absentees, in personam.

So far as absentees are concerned, this article has application only where the suit is *in rem* (*ad rem*) or *in re*; that is to say, is against or concerning some property or status within the State or over which the courts of the State have jurisdiction. The proceeding, therefore, strictly speaking, is not against the absentee, but against or concerning the property or status; and the curator ad hoc does not represent the person of the absentee, but is appointed to see that the interests of the absentee are protected.

The subject is a large one, and a full discussion cannot be attempted here. See the notes to *Pennoyer vs. Neff*, in 24 Law. Ed.

All we can do is to cite the decisions of our own courts in which proceedings (nominally) against absentees represented by curators ad hoc have been upheld, and to classify these decisions so as to furnish a ready guide to the practitioner.

Cases in Which Our Courts May Entertain Suits Affecting the Property or Status of an Absentee Represented by a Curator ad Hoc.

Real Estate.

(A) In real actions (C. P. 4, 41 et seq.). Broadly speaking, when the subject-matter is *real estate* within the jurisdiction of the Court.

(a) To rescind the sale thereof. *Adler*, 126 La. 472, 52 Sou. 668; *Robbins*, 43 A. 489, 495; *McKenzie*, 38 A. 764.

(b) In the partition thereof. Tell, 122 La. 1040, 48 Sou. 448; Woolverton, 52 A. 1147; Crawford, 46 A. 1261, 15 Sou. 693; Gibbs, 47 A. 768; Hansell, 44 A. 548, 10 Sou. 941; Buddecke, 31 A. 572, 574; Morris, 30 A. 879; Vick, 47 A. 43; Sauton, 45 A. 919, 13 Sou. 203; Gates, 46 A. 297; Jacobs, 134 La. 391.

(c) To enjoin the seizure and sale thereof by absentee. Phillips, 52 A. 442.

(d) In petitory action. Byrne, 51 A. 556.

(e) To quiet the title thereto. Bartels, 48 A. 783, 786; Clayton, 128 La. 103, 54 Sou. 486.

(f) For declaration of simulation. Wunstell, 39 A. 312, 1 Sou. 893.

(g) For specific performance of agreement respecting. Mason, 43 A. 397, 8 Sou. 930.

(h) To determine validity of, or interest in, incumbrance thereon. Pasley, 38 A. 475; Duruty, 42 A. 357, 7 Sou. 555. To set aside pledge of mortgage notes. Meyer, 110 La. 132, 141; Tudor, 6 A. 27.

(i) In hypothecary action. Randolph, 21 A. 486; Samory, 19 A. 333. But the judgment will be limited to the property mortgaged, and no personal judgment can be rendered. Thayer, 2 A. 1010; George, 3 A. 652; Bartlett, 31 A. 540. Privilege. O'Hara, 29 A. 818.

In executory process, an attorney must be appointed. C. P. 737; Dixie, 23 A. 426, 427; Lasere, 21 A. 206; Hall, 21 A. 692; Buck, 109 La. 776, 33 Sou. 767; Huber, 111 La. 758; Rogers, 124 La. 95.

(j) To annul judgment recognizing title thereto. Ferguson, 6 A. 218.

Judgments.

(B) Where the suit is concerning the validity of, interest in, or enforcement of, any judgment of the Court in qua. Young, 42 A. 362, 7 Sou. 557; Fly, 37 A. 670.

Or the revival of any such judgment. Bertron, 43 A. 1171, 1177.

Enforcement of twelve months' bond. Cobb, 30 A. 1229.

Marriage Status.

(C) In suits concerning the marriage status, where the proper requisites obtain.

It is believed by the writer that Act 296 of 1910 (see note 3, ante) adds nothing whatever to the law as it stood prior thereto, and might as well be stricken from the statute-book. It has been once cited by the Supreme Court, *Wheeler*, 134 La. 75, and was there cited only to get around a prior erroneous ruling of the Court in *Whitney*, 129 La. 572, that the petition alleging absence must be sworn to. No law had required such proof, and the *Whitney* case was in this respect simply judicial legislation, as will plainly appear from the authorities cited in the *Wheeler* case, p. 76. Therefore, the act of 1910 has not even this slim excuse for existence.

More information on the subject of the validity and effect of divorces obtained against absentees can, we believe, be obtained by reading the case of *Haddock vs. Haddock*, 201 U. S. 562, 5 A. & E. Ann. Cas. 1, and the note thereto, 5 Ann. Cas. 26, than from any other source. Justice White makes it plain that every State has such control over the marriage status of its citizens that a divorce obtained against an absentee by any kind of substituted service in accordance with State law may be given full effect within the State without violating the due process clause of the Federal Constitution.

However, unless one or more of certain requisites obtain, a divorce thus obtained is not one which another State is compelled to recognize as valid under the full faith and credit clause of the United States Constitution. In the following classification we attempt to follow the *Haddock* case and cite the Louisiana authorities sustaining the proposition.

(a) Instances where judgment of divorce or separation obtained upon substituted service must be recognized throughout the United States.

(I) Where both husband and wife are domiciled in Louisiana and one of the parties leaves the State. *Haddock*, 5 Ann. Cas. 4, Fifth; *Wheeler*, 134 La. 63, 63 Sou. 624; *Larquie*, 40 A. 457, 4 Sou. 335; *Lachand*, 10 A. 156.

(II) Where the parties were married in Louisiana and one of them leaves the State. Butler, 45 A. 279, 12 Sou. 356, 19 L. R. A. 814; Baker, 114 La. 727, 38 Sou. 532; Wilcox, 115 La. 48, 38 Sou. 890.

(b) Instances where courts of this State might grant divorce against non-resident, which would be valid in Louisiana (under the Haddock case), but not entitled to recognition in other States.

(I) Where the plaintiff is a citizen of Louisiana, the other party having never been a resident, and the marriage domicile having never been here.

Our Courts have never been liberal in granting divorces. It may be said our decisions have never extended the right to a divorce on substituted service, beyond the instances above given, where the divorce would be valid in every State. Although the mere fact that a party is a citizen of this State, gives this State, under the Haddock case, the right to control his marriage status within her borders, this right has never been recognized, except where the above stated requisites obtain, which make the divorce valid everywhere.

Thus, in Muller, 13 A. 1, it was held that where marriage took place in New York, and wife had always lived there, the husband who had acquired a residence here could not maintain the action here on the ground of abandonment. And the same was held in Heath, 42 A. 437, 7 Sou. 540; and in Nicholas, 52 A. 1493, 1495. And see Champon, 40 A. 28, 3 Sou. 397. And so under Art. 142 of the R. C. C., Connella, 114 La. 950, 38 Sou. 690.

But while slow to grant a divorce where only the plaintiff has been domiciled in Louisiana, our Court has accorded validity to judgments rendered under like circumstances in other States. Benton, 106 La. 494; and in the absence of evidence, the judgment of a sister State will be presumed valid. Barringer, 127 La. 680, 684. See Smith, 43 A. 1140, 10 Sou. 248.

From these decisions it will appear that actual and bona fide residence of at least one of the par-

ties in a State is absolutely necessary to give the courts of that State any jurisdiction whatever over the marriage status. As we have seen, our Courts have been averse to taking jurisdiction where only one of the parties has been domiciled here. Now, whether the Act 296 of 1910 will be so construed by our courts as to cause them to take jurisdiction in such cases, where other States will not be bound to recognize the decree, remains to be seen. The writer has already expressed his opinion of this act in the first paragraph of this note C, and adheres to that opinion.

(c) Instances where a divorce or separation granted on substituted service, can have no validity in Louisiana or elsewhere.

(I) Where defendant is not an absentee, and such fact might have been known on sufficient inquiry. Whitney, 129 La. 572, 576. Or was known. Elmore, 121 La. 277, 46 Sou. 310.

(II) Where there is neither allegation nor proof that either party is domiciled here. Blake, 111 La. 1096, 36 Sou. 203.

Successions.

(D) In settlement of succession, absent heir may be represented by curator ad hoc. Fly, 37 A. 667, 669.

Annulment of Contract.

(E) Where suit is brought *by a party to a contract* to annul the same, against a resident party, any necessary party to the suit who is an absentee, may be brought in through a curator ad hoc. West, 115 La. 219. See note (J) following Art. 165.

Joint Obligors.

(F) It has been twice held that when one of two or more joint obligors is an absentee, he may be sued with his co-obligors, and brought into court through a curator ad hoc. Jelks, 5 A. 674; Hyde, 22 A. 383. This was held on the ground that, under the law at that time, all joint

obligees had to be sued together, and that the absentee subjected himself to this eventuality when he signed the obligation.

Now, however, under Act 103 of 1870 (Acts, 1871, p. 18), joint obligors may be sued separately; therefore the reason no longer holds. See West, 115 La. 220, 221.

Administrator.

(G) An *Administrator* who leaves the State may be sued in the court which appointed him for account; and condemned personally. McGehee, 41 A. 657, 661.

Attachment.

(H) Parties having a personal claim against absentee may attach property found in the jurisdiction of the court, and the judgment will be in rem,—against the property attached and only against such property. Broughton, 2 A. 569, 571; Page, 6 A. 549; McCall, 11 A. 209.

And such a judgment cannot become a judicial mortgage. Herber, 39 A. 1112, 3 Sou. 259.

The Court issuing the attachment may subsequently, in the same suit, attach other property of the absentee, situated in other jurisdictions within the State. Kahn, 35 A. 1039.

Sequestration.

(I) And so parties having a privilege on movable property situated in this State belonging to an absentee may sequester the property and proceed in rem to have privilege recognized and enforced. McDonald, 13 A. 405; Adler, 36 A. 170, 172. In Levy, 115 La. 204, 38 Sou. 866, it was strenuously contended that, where only enforcement of the lien and privilege on movables in the jurisdiction of the court was asked for, it made no difference that the property had not been seized; that the proceeding was only in rem. But the Court held that actual seizure was necessary in order to vest the Court with jurisdiction.

Property Held in Pledge.

(J) Plaintiff holding property of an absentee in pledge may proceed to enforce his contract of pledge

through appointment of curator ad hoc. Dwight, 18 A. 209.

(X) We subjoin here the cases holding that no personal judgment can be rendered against an absentee, represented only by a curator ad hoc. It should be a source of pride to Louisianians that the doctrine of *Pennoyer vs. Neff*, ante, was settled law in Louisiana long before that decision, as may be seen from reading the following cases:

Dupuy, 2 A. 562; Peterson, 3 A. 101; Favrot, 4 A. 584; Tudor, 6 A. 27; Prindle, 9 A. 34; Stevens, 9 A. 239; Hedrick, 10 A. 208; Walker, 13 A. 505; Marshall, 13 A. 619; Pagett, 15 A. 451, 452; Watson, 15 A. 709; Fell, 17 A. 237; Bogay, 25 A. 305; Laughlin, 35 A. 1184; Bank, 40 A. 798; Hobson, 44 A. 383, 386, 10 Sou. 762.

Not even for *alimony* in divorce case over which court has jurisdiction. Baker, 114 La. 727, 735.

Nor even where plaintiff has *privilege on personal property* in jurisdiction of the court. Levy, 115 La. 204, 209, et seq.

Nor even where the absentee is a *party to a contract* sought to be annulled *by a third party*, and the other parties to the contract are subject to the jurisdiction of the Court. West, 115 La. 214, 38 Sou. 969.

Nor even where the absentee is sought to be *called in warranty*. Bracy, 36 A. 796, 797; Cassidy, 40 A. 834; West, 115 La. 220; Andrews, 122 La. 464, 47 Sou. 771; Andrews, 125 La. 217, 51 Sou. 122.

Our research has revealed only two Louisiana cases, which, when well digested, are in conflict with *Pennoyer vs. Neff*. These two are Field, 19 A. 36, and Penn, 28 A. 576. Let these two be forgotten.

Appointment Jurisdictional.

(18) The appointment of a curator ad hoc, in a proper case, is necessary to the jurisdiction of the court, and must be done on pain of nullity. Gates, 46 A. 286, 297.

And where one has been appointed in a proper case, judgment is *res adjudicata* against absentee. Clayton, 128 La. 103, 54 Sou. 486.

And where defendant is present or represented in the State to the knowledge of plaintiff, judgment will be de-

clared null. Elmore, 121 La. 277, 46 Sou. 310; Huber, 111 La. 748, 35 Sou. 889; Savant, 136 La. 248, 251. Only temporarily absent. Whitney, 136 La. 233.

Appointment by Clerk.

(19) The Clerk can appoint curator ad hoc, only in absence from parish, or recusation, of judge. Act 43, 1882, p. 54, Sec. 4. And affidavit of absence or recusation must be annexed to petition, else Clerk's appointment void. Act 43, 1882, Sec. 6; Gates, 46 A .298.

(20) *Presence at the trial* of a non-resident, or testifying in the case, is not an appearance or submission to the jurisdiction of the Court. This cannot take the place of citation, and gives the Court no personal jurisdiction over him. Andrews, 125 La. 217, 51 Sou. 122.

Reconventional Demand vs. Absentee.

(21) It has happened that a non-resident, coming into a court in this State to annul a personal judgment rendered against him, was sued in reconvention on the original claim and condemned to pay it. Andrews, 125 La. 217, 51 Sou. 122. This case leaves open the question whether or not he could have prevented the judgment in reconvention by a course other than the erroneous one which he took. p. 227.

(22) *Kindred Legislation.*

(a) *In General.* Act 23 of 1900, p. 29, attempting to confer on our courts jurisdiction over absentees, and provide for service on them outside of the State, was promptly declared unconstitutional, null and void. Aikmann, 122 La. 265, 47 Sou. 600.

(b) *Concerning Foreign Corporations.*

(b1) *In General.* Our laws require that a foreign corporation doing business in the State shall designate an agent on whom process to be served. Const. Art. 264; Act 267, 1914, Secs. 23, 24, p. 531; Act 194, 1912, p. 382; Act 243, 1912, p. 543. This latter act may be repealed by the repeal of the act which it amends. See Act 267, 1914, p. 567, Sec. 33.

Where the foreign corporation has appointed such an agent and service is made on the agent, such service, of course, brings the corporation personally within the jurisdiction of the State court. This is as provided in subdivision (a) of Section 26 of Act 267 of 1914, p. 532 (Printed Post under Art. 198). *State vs. Timber Co.*, 106 La. 621.

It may well be doubted whether service made in accordance with subdivision (b) of Sec. 26 of Act 267 of 1914 (Printed Post under Art. 198), would give the Court jurisdiction to render a personal judgment against the foreign corporation. See *Southern Sawmill*, 115 La. 237, 38 Sou. 977; *Aikmann*, 122 La. 265, 47 Sou. 600. The latter case was not however a corporation case, and in the *Southern Sawmill* case, service was not made at an established office. A corporation, being a fictitious person, can be served only through an agent, and it is very probable that service on an active agent at an established office in the State, would give the Court personal jurisdiction over the corporation. The subject is too large a one to permit of full discussion in the scope of this work. See *Milwaukee*, 106 La. 669, and cases cited in opinion; *Curtis*, 115 La. 818, and cases cited on pp. 923 to 925. See Note 3 to Paragraph 5 of Art. 165.

There is no doubt, however, that the service provided for by subdivision (c) of Sec. 26 of Act 267 of 1914, p. 533 (Printed Post under Art. 198), is not such service as will give the Court jurisdiction to render a personal judgment against the foreign corporation. It is no more than a substituted service. *Gouner*, 123 La. 964, 49 Sou. 637; *Iddle*, 132 La. 476, 61 Sou. 532. In garnishment, the service must be personal on an authorized agent. *O'Conner*, 129 La. 412, 56 Sou. 350.

(b2) *Concerning Foreign Insurance Companies.* Our laws provide that foreign insurance companies doing business in this State shall designate the Secretary of State as their agent for the service of process in suits against them here. Act 105, 1898, Art. II, Sec. 1; Act 256, 1912, Sec. 17, p. 574; Act 243 of 1912, p. 544. These provisions are not superseded by the General Corporation Act, 267 of 1914. Where the

foreign company has designated the Secretary of State for such purpose, service on him, of course, gives the Court personal jurisdiction over defendant. But it has been decided that Act 105 of 1898 only provided an additional and not an exclusive mode of service, and that service upon a resident agent gave the Court jurisdiction in personam. Curtis, 115 La. 918, 923, and cases cited in the opinion. See also Milwaukee, 106 La. 669, and cases cited in the opinion.

Against Minor, by Tutor.

Art. 117. When the tutor of a minor has interests opposed to those of his ward, he cannot sue him except by making the undertutor defendant in the cause.

(1) Where tutor and minor are both parties to a partition, minor should be represented by under-tutor. Aguilard, 13 A. 97, 98. And in partitions several minors who have conflicting interests, should each be represented by a special tutor. Not so where the minors together form one root and no partition is asked as among them. Hagan, 15 A. 394; Metcalfe, 31 A. 389, 394.

Against Married Woman.

Art. 118. When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband.

Should her husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought to defend it alone.

Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the judge being required.

(1) Only one citation necessary, provided it is addressed to both. Art. 182.

(2) If the *husband is under interdiction*, plaintiff must demand the authorization of the judge. R. C. C. 182.

(3) (a) Except where husband is absent or interdicted, both must be made parties and cited. This is true in bankruptcy proceedings, for the Federal courts follow the State courts in this respect. Horton, 130 La. 1008, and cases cited. And judgment cannot be rendered against her as garnishee, unless husband is cited with her. Delacroix, 23 A. 192; Delacroix, 24 A. 141, overruling Henry, 11 A. 691.

(b) In other suits. Saunders, 38 A. 367, holding Judge's authorization invalid. Reardon, 30 A. 122.

(c) Making both parties defendant is all the authorization required. Hall, 21 A. 692. And valid judgment is obtained against her on confirmation of default against both. Drogre, 21 A. 640; Gilmore, 9 A. 197; Stone, 9 R. 194; Phipps, 31 A. 88; Hall, 10 A. 412; Tillet, 12 A. 146.

(d) The husband may be made a party and cited merely to authorize his wife to appear and defend the suit. Francis, 28 A. 404. And the later decisions hold that where this is done, the wife is in court like any other person, and that default taken and confirmed against her alone will be a valid judgment. Francis, 28 A. 404, 407. Or, after default against both, she may appear alone and answer, and judgment against her will be valid. Zuberbier, 34 A. 1048, 1049. And the same held where wife alone filed answer without default having been entered. Riley, 27 A. 248.

(e) But the older decisions are in direct antagonism to this view. They hold that the wife can make no appearance without her husband; that such an appearance is no appearance at all. Adle, 1 A. 260; Lovelace, 3 A. 619; Champlin, 19 A. 148. This last case seems to hold that taking a default would supply the place of authorization. White, 20 A. 281. In Rils, 15 A. 182, it was held that no default can be entered against the wife before authorization, although her husband seems to have been duly made defendant with her. This case stands alone and is certainly opposed to the whole weight of authority, *supra*.

(f) The cases, Champlin, 19 A. 148; Washington, 19 A. 146; White, 20 A. 281; Rils, 15 A. 182, seem to hold that

where the husband fails, after citation, to authorize the wife, the plaintiff should have the Judge to authorize her before proceeding further. But we submit that there is no authority whatever, in a suit under this article, for an authorization by the Court, except where the husband is absent, or under interdiction, and the later cases, *supra*, may be viewed as entirely overruling this view.

(g) It seems positive, under the weight of the foregoing authority, that all that plaintiff has to do is to see that the husband is properly made defendant with the wife, and properly cited with her. No difficulty at all is presented, if neither party appears, for plaintiff may validly take and confirm default as to both: Paragraph (c) *infra*. No difficulty is presented if the husband appears with the wife. Note 4, *post*. But difficulty presents itself when the wife appears alone, for here we have the conflict between the decisions cited in paragraph (d) and those cited in paragraph (e) *infra*. There is logic in the view that the wife's appearance without her husband's authorization is no appearance at all. It would seem then that plaintiff should take no notice of such an appearance, but should take and confirm default as though there were no appearance whatever. The decisions in paragraph (d) being the later decisions should be followed, however, and there is logic to support them also. We suggest, however, that where the wife appears alone and answers, and the case is tried on the issue joined by her, it would be safe to seasonably take a default against the husband, for some of the cases hold that it is the default that supplies the authorization: Paragraph (e), *infra*.

(4) Where the husband joins the wife in answer to the suit, she is authorized, although he was not cited as her husband. *Faveron*, 14 A. 805; *Jordan*, 29 A. 749. And when sued and cited jointly with her, his appearance for any purpose makes his authorization to be implied. *Lehman*, 45 A. 346, 353; *Chiasson*, 10 La. 570; *Woodward*, 11 A. 280, 281. But where they are separate in property, the husband has no right to appear and file answer for wife without her consent. *Dugat*, 2 La. 29; *Chiasson*, 10 La. 570.

(5) It seems that where a woman marries after having been legally brought into court, the authorization of

the *ex post facto* husband need not be obtained. Faverson, 14 A. 805.

(6) Citation served on a married woman, without any citation of the husband, she being sued as a single woman, cannot have any legal effect. Bertrand, 39 A. 431, 2 Sou. 63.

(7) In *executory process* against wife's separate property, foreclosing a mortgage executed by the wife with the husband's authorization, the joinder of the husband as defendant is not necessary. Stewart, 23 A. 83; Dobard, 34 A. 1193.

(8) Proceedings for the *collection of taxes* are governed by special laws, which in such proceedings govern the general provisions of this article. Roberts, 34 A. 205, 208; Lavergne, 28 A. 677.

(9) *Appeals Against Wife*. (For Appeals by Wife, see Note 4 to Art. 106.) Husband must be joined and cited in the appeal. Wells, 10 La. 399, 401. And where appeal is granted on motion in open court, he must be named in appeal bond. Lawrence, 12 A. 843.

(10) All the foregoing applies, even though the wife is a public merchant. R. C. C. 121. But these articles do not apply to a married woman domiciled in another State, whose status is controlled by her own laws. Freret, 119 La. 308, 44 Sou. 26.

Against Corporations.

Art. 119. Suits against corporations, corporate bodies, or chartered companies, must be brought against them under their legal titles.

(1) To same effect, Act 267, 1914, Sec. 7, (c); New Orleans Terminal Co., 113 La. 737; Whitehall, 127 La. 1026.

(2) As to citation, Art. 198 and notes.

(3) Suit can be brought against an organized department of a corporation only if the charter permits

such department to sue and be sued. Otherwise, the suit must be brought against the corporation. State, 113 La. 151, 36 Sou. 921; Stone, 28 A. 104.

Death of Defendant.

Art. 120. If one against whom there was a cause of action die, leaving one heir only, the suit shall be carried on against such heir as it would have been against the deceased.

If the suit had already been brought against the deceased, and he had not answered, it shall not be interrupted, but shall be continued against the heir by mere citation or notice, served on him to that effect, within the delay for original citations, according as the distance may be from his domicile to the court where the action has been brought. If, on the contrary, the deceased have two or more heirs, the plaintiff may proceed personally against each of them for the share of which he inherits, if that share be sufficiently known and ascertained by an inventory or partition; otherwise they can only be sued each for a virile portion, that is to say, for an equal part of the debt, dividing it in as many parts as there are heirs.

If the suit had been already commenced against the deceased, it shall be continued against his several heirs by citing each of them separately as if there was only one, but judgment can only be given personally against each for his hereditary share, or virile portion, as above provided. (To be concluded, post.)

C. P. 21, 25, 27, 40, 113, 121, 361; R. C. C. 1000, 1426, 1427, 945, 1425, 1013, 2114, 940, 942, 1423, 1424; C. P. 977 et seq.; R. C. C. 2128, 2129, 944, 977, 1010, 1032; C. P. 974; R. C. C. 894, 1054.

(1) It has been held that the heirs referred to in this

article (following Art. 25) are "*necessarily* the heirs who have accepted the succession." Deshotels, 134 La. 1076.

But we cannot conclude that only those heirs who have accepted can be sued or made parties under this article, for Art. 1000, R. C. C., makes the heir liable as such if, when cited as heir, he suffers judgment to go against him without renouncing or claiming benefit of inventory.

The heirs may appear and renounce after the taking of a default against them; and, if all do not renounce, judgment may be rendered against those who do not. Union Bank, 46 A. 630, 15 Sou. 304.

But the renunciation of all the heirs after citation served on them will not prevent the revival of a judgment against the succession, even though their renunciation leaves no interested party represented in court. Burbridge, 34 A. 681.

(2) *Citation or Notice.* Where defendant has not answered before his death, citation or notice must be served on the heirs, and the same delays as on ordinary citation allowed them, even though default had been entered against defendant before his death. Union Bank, 44 A. 170, 10 Sou. 597; Bedford, 18 A. 40; Norton, 23 A. 102.

Where defendant has answered before his death, his heirs (or administrator) must be made parties in his stead; but there is no necessity for default against or answer by them. McCloskey, 32 A. 38, 44.

A judgment against deceased, without following the provisions of this article, would be a nullity. New Orleans Ry. Co., 8 A. 80; Myers, 33 A. 1013; Pickett, 41 A. 882; McCloskey, 29 A. 141. But where the heirs, or representatives, have been properly made parties, the rendition of the judgment against deceased, eo nomine, will be regarded as a clerical error, and will not vitiate the judgment. Stackhouse, 41 A. 415, 424; Stackhouse, 36 A. 529, 531.

Where this article has not been followed, the Supreme Court will reverse and remand for the making of proper parties. Bates, 2 A. 484; Myers, 33 A. 1013; Bedford, 18 A. 40.

Nor, if defendant die after judgment rendered, can it be executed without proper proceedings against the heirs

or representatives. Surgi, 22 A. 20, 23; Garrard, 5 R. 508.

The law does not require that a copy of the petition be served on the heirs or administrator with the citation or notice. Howard, 10 A. 504.

(3) *Corporations.* The dissolution of a corporation, in any legal manner whatever, is the death of the corporation. If it occurs after suit filed, liquidators or other proper successors must be made parties. See note 5 to Art. 112; Musson, 11 R. 37.

(4) *Administration.* A creditor of a deceased person can provoke an administration for the settlement of his debt; but not if the succession has been opened and closed and the heirs sent into possession. He must then proceed against the heirs. Caire, 43 A. 1133, 10 Sou. 203; Beauregard, 33 A. 827; Freret, 31 A. 506; Aronstein, 51 A. 1052.

Art. 120, Concluded—Administrators, etc., Becoming Defunct.

All suits brought against curators and other administrators, during the time of their administration, shall, after the expiration of their time, and even after they have rendered their accounts to the heirs, be continued and tried without any additional formality, except that of making the heirs parties, which shall be ordered by the court on motion of any one of the parties, or on application of such heirs themselves.

(5) The term "administrators," as here used, includes "tutors." Lewis, 33 A. 1419.

(6) It must be made to appear of record that the minors have attained their majority, or it will be presumed that the tutor still represents them. Lewis, 33 A. 1417.

Hypothecary Action Against Heirs.

Art. 121. The hypothecary creditors of a person deceased have, besides their action against each of his heirs, as provided in the preceding article, an hypothecary action against such of the heirs who have possession of some property subject to their hypothecation.

C. P. 62, 65, 66, 67, 734.

This action lies for the whole amount of the debt, whether the heir thus sued possesses the whole or only a part of the hypothecated property; he has, however, his recourse against his coheirs for the share which they are bound to contribute towards the payment of the debt.

C. P. 66, 67.

The heir against whom the hypothecary action is instituted, may be discharged by relinquishing such hypothecated property as may have fallen to his share, if there has been a partition, or his undivided share of such property, if the property has not been divided.

Compare C. P. 68, 69, 74.

But this relinquishment shall not free the heir from his liability to the personal action in case the creditor should prefer to proceed against him directly rather than to resort to the hypothecary action, or in case the proceeds of the sale of the hypothecated property should be insufficient to discharge the debt.

(1) A sale under executory process without notice to heirs or succession representative is null. Andrews, 5 A. 737; Surgi, 22 A. 20, 23.

Suits Against Vacant Successions.

Art. 122. All kinds of actions may be brought

against vacant successions, when all the heirs are absent and not represented in the State, provided they be instituted against the curator appointed to administer the succession.

The judgments rendered against the curator are as valid and efficacious as if they had been rendered against the heirs themselves.

But if some of the heirs of the deceased are present or represented in the State, the suit must be brought against the heirs present or represented as well as against the curator of those who are absent.

R. C. C. 51, 1113, 1155.

(1) It makes no difference that the one appointed is styled "administrator." Duties are substantially the same. And the acts of one illegally appointed are valid. *Altemus*, 32 A. 364.

(2) Heirs represented only by an attorney for absent heirs, appointed by the court, are not "heirs represented in the State," in the meaning of this article. *Durnford*, 8 R. 488.

Against Testamentary Executors.

Art. 123. Testamentary Executors may appear, and defend all the actions brought against the succession they administer, when none of the heirs are present or represented in the State; but if all the heirs, or any one of them, be present or represented, none but personal actions can be brought against the testamentary executor alone. All real actions, such as those of revendication, and the like, must be brought both against the testamentary executor and the heirs present or represented.

Personal actions. Arts. 3, 26 et seq. Real actions. Arts. 4, 41 et seq.; C. P. 12, 61, 62.

R. C. C. 1676.

(1) This article is construed to apply to suits by testamentary executors as well as to suits against them. Delaneuville, 114 La. 68; Benton, 106 La. 99, 109; Woodward, 38 A. 242.

(2) Heirs must be joined in *Real Actions* brought by or against testamentary executor; as:

(a) Suit to compel specific performance of agreement to sell land. Girault, 117 La. 277, 285.

(b) Petitory action. Bird, 34 A. 321; Cronan, 9 A. 302; Giddens, 37 A. 418.

(c) Hypothecary action proper. Labauve, 31 A. 134, 138, 140, 141.

(d) Suit to annul a donation. Hart, 6 La. 97; Thibodaux, 30 A. 1119.

Except they be not present or represented in the State. Benton, 106 La. 99.

(3) But forced heirs can sue to annul a simulated sale of the ancestor to the extent of the legitime, either with or without the executor. Guilbeau, 30 A. 1099.

(4) In *partition suits* by or against a co-owner of deceased the executor has no power to represent the heirs or the succession. The co-owners are the proper parties. Boutte, 30 A. 177, 182, and cases cited; Hewes, 46 A. 1281. But they may be joined with executor. Gibbs, 47 A. 766, 17 Sou. 291. But it has been held that executor can sue alone for partition when the estate goes to universal legatees and not to heirs of the blood. Smith, 44 A. 51, 53, 54.

(5) Suits which are *not real actions*, and which may be brought by or against executor alone:

(a) Suit for usufruct. Denegre, 33 A. 689.

(b) Suit to redeem lands sold for taxes. Coleman, 24 A. 524.

(c) Suit by evicted vendee for breach of warranty. Cassidy, 40 A. 828, 833.

(d) Suit to revive a judgment. Beall, 34 A. 1098; 35 A. 1022.

(6) *Administrators*. This article has been extended to administrators. Ledoux, 30 A. 576, 580.

But administrator may sue alone to recover real property when succession is unsettled, owes debts, and heirs have not acceted. Woodward, 38 A. 238, 243. Not so where succession owes no debts and heirs have accepted. Preston, 125 La. 535, 541, and cases cited.

And, under like circumstances, he may sue alone for partition. Dumestre, 42 A. 411. But it is later held that he can sue for partition if he makes the heirs parties. Wilson, 107 La. 139, 142.

But where the heirs have accepted and divided the property he cannot, without the heirs, in a petitory action, attack a title to which the deceased was a party. Wilson, 109 La. 718, 725.

Where heirs have not accepted, he may alone defend suit pending against deceased at his death for recovery of immovable property. Vicksburg, 112 La. 51, 58.

And where the succession owes debts he may sue alone to rescind sale of immovable for happening of resolutive condition. Delaneuville, 114 La. 62, 67.

(7) An administrator can attack the acts of the deceased as being fraudulent or simulated only where there are creditors who are injured by such acts. West, 14 A. 610; Hebert, 29 A. 511; Berens, 6 A. 494; Stewart, 23 A. 627.

Forced heirs are considered as creditors to the extent of the legitime, and may, to that extent, attack, where necessary, the acts of the ancestor. Louis, 12 A. 684; Maples, 12 A. 759; Tesson, 27 A. 266; Jones, 119 La. 677, 683.

No necessity in such cases for administrator and forced heirs to join or be joined. See note 3, *supra*.

PART II.

CONTAINING RULES TO BE OBSERVED IN THE PROSECUTION OF CIVIL ACTIONS.

TITLE I.

PROCEEDINGS TO BE OBSERVED IN THE PROSECUTION OF ACTIONS BEFORE COURTS OF ORIGINAL JURISDICTION.

Scope of Title.

Art. 124. The rules of proceedings, contained in the present title, relate only to the district and parish courts of the State, when in the exercise of their ordinary jurisdiction.

Special rules are hereafter established for courts of probate and justices of the peace.

No Parish Courts under the present Constitution.

Proceedings in Courts of Probate, Title III, post.

Proceedings before Justices of the Peace, Title IV, post.

(1) The provisions of this title do not apply to the Supreme Court. State, 132 La. 953. Nor to proceedings before Justices of the Peace. Abraham, 130 La. 1105, 1101; Bain, 124 La. 585; Johnson, 124 La. 144; Wertheimer, 116 La. 490; State vs. Huft, 39 A. 990; State vs. McCrea, 40 A. 22. Nor to Courts of Probate; interdiction proceedings are probate proceedings. Pons, 132 La. 376.

CHAPTER I.

**Of Courts of Original Jurisdiction and
Their Powers.****Territorial Jurisdiction.**

Art. 125. The limits of the territorial jurisdiction of the several district and parish courts in this state are established by special statutes.

Const. 1913, Arts. 107, 108, 132; Const. 1898, Arts. 107, 108, 132.

Jurisdiction of District Courts.

Art. 126. * * *

Conflict of Privileges and Mortgages; Concursum.

Whenever a conflict of privileges arises between different creditors, all the suits and claims shall be transferred to the court, by whose mandate the property on which the privilege or right of mortgage is to be exercised, was first served (sic) on *mesne* process, or definitive execution; and said court shall proceed to class said privileges and rights of mortgage according to their rank and dignity, in a summary manner, after notifying all parties interested. * * *

R. S. 2903; C. P. 397; R. S. 1942; C. P. 301.

(1) In Bank, 127 La. 911, the word "served" above is rendered "seized." See this case for interpretation of the above paragraph. 54 Sou. 145. Factors', 31 A. 100; Adams, 29 A. 315; Babin, 31 A. 725; Morris, 35 A. 759.

(2) Property in hands of a receiver. Board of Missions, 130 La. 1076, 58 Sou. 888; Carre, 128 La. 205, 54 Sou. 740.

(3) A third opposition claiming privilege on property seized by writ from a Justice of the Peace may be filed in the justice's court, even though the amount of opponent's claim is beyond the jurisdictional amount of the justice's court. McLeod, 50 A. 112. In this case, however, a judgment recognizing opponent's privilege had been obtained in the District Court. In Brown, 51 A. 483, it is held that where the amount of opponent's claim is beyond the jurisdiction of the justice's court, and has not been liquidated by judgment, he cannot go into the justice's court, but can compel the plaintiff in the justice's court to come into the District Court to try the conflict of privilege. p. 486. But third opposition for amount below jurisdiction of District Court lies in District Court. Wells, 138 La. —, 69 Sou. 659.

(4) Where property is sold under a senior mortgage, the purchaser can retain the surplus, after satisfying the seizing creditor, for the payment of junior mortgages; and the holder of a junior mortgage cannot, by appearing in the same suit, compel the distribution of this surplus. Denegre, 46 A. 90, 97.

Article 126 is all omitted herein except the above printed paragraph, for the reason that all the omitted part has been superseded by constitutional provisions. We here print the extracts from the Constitution (of 1913) which have superseded the omitted paragraphs.

Const. Art. 109. The District Courts, except in the Parish of Orleans shall have original jurisdiction in all civil matters where the amount in dispute shall exceed fifty dollars (\$50.00), exclusive of interest and in all cases where the title to real estate is involved, or to office or other public positions, or civil or political rights, and all other cases where no specific amount is in contest, except as otherwise provided in this Constitution.

They shall have unlimited and exclusive original jurisdiction in all criminal cases except such as may be vested in other courts authorized by this constitution; and in all probate and succession matters, and where a

succession is a party defendant, and in all cases where the State, a parish, municipality or other political corporation is a party defendant regardless of the amount in dispute; and of all proceedings for the appointment of receivers or liquidators to corporations or partnerships; and said court shall have authority to issue all such writs, process and orders as may be necessary or proper for the purpose of the jurisdiction herein conferred upon them.

Const., Art. 109, as amended by Act No. 257, p. 494, of 1914.

(5) *Jurisdictional Amount.* Where several demands are cumulated, as allowed by C. P., Art. 151, the aggregate amount fixes the jurisdiction. Learned, 128 La. 430, 54 Sou. 951.

Where only interest is sued for (the principal having been paid), the amount of interest sued for fixes jurisdiction. Turner, 124 La. 675, 50 A. 649.

Exclusive of interest. State, 49 A. 249; Art. 91, notes 1 and 2.

(6) *Title to Office or Other Public Positions.* District Courts have jurisdiction in contests for public office without regard to pecuniary value. McClenny, 114 La. 779, 38 Sou. 558; Reynolds, 114 La. 610, 38 Sou. 470; State, 51 A. 1099.

(7) *Civil or Political Rights.* Jurisdiction to order a party committee to hold a primary election. Conerly, 130 La. 458. Or perform any other purely ministerial duty. Trosclair, 120 La. 620, 45 Sou. 526. Or refrain from doing a wrong act. 111 La. 714.

But cannot under this article interfere with the discretion of such party committees. In such matters this article yields to special laws prescribing time and manner of appealing to courts. Roussel, 129 La. 930, 57 Sou. 272; Burke, 111 La. 939, 943.

If the law providing for an election to locate a courthouse makes no provision for contest of such election, the Court cannot entertain a suit to contest same; but the Court can inquire as to whether the election was held

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as provided by law. Nixon, 132 La. 53, 60 Sou. 717. So with local-option election. Hagens, 121 La. 634, 46 Sou. 676.

Under this head are included cases of illegal assessment and taxation, regardless of amount. Bunkie, 113 La. 1062, 1065.

And the right to inspect and make free use of public records. Marsh, 110 La. 728.

And right to register. State vs. Gleason, 112 La. 612.

(8) *Where No Specific Amount Is in Contest.* Suit by a resident of a town to compel the holder of the franchise to furnish the plaintiff lights. State, 127 La. 888.

Possessory actions. Grunewald, 105 La. 219, 221, 222, 223.

Protection of personal rights. To prevent placing of one's photograph in rogue's gallery. Schulman, 117 La. 704, 42 Sou. 277; Itzkovitch, 117 La. 708, 42 Sou. 228; Itzkovitch, 115 La. 479, 39 Sou. 499; see note 15, e, *infra*.

See, generally, Mayor, 35 A. 637; State, 45 A. 680, 12 Sou. 892; Scott, 46 A. 279; Mouton, 49 A. 1535, 1538.

(9) *Probate and Succession Matters.* Interdiction proceedings are probate proceedings. Pons, 132 La. 876.

(10) *State, Parish, Municipality, etc., Defendant.* Bunkie, 113 La. 1065.

But the mere fact that the State or other political corporation is made defendant cannot give the Court jurisdiction under this provision if the matter is one in which the law does not give the right to sue such political corporation. Nixon, 132 La. 57.

(11) *Receivers to Corporations.* Jurisdiction to appoint limited to the cases provided by law. Dauphin, 108 La. 521, 537.

(12) *Liquidators or Receivers for Partnerships.* Mitchell-Borne, 134 La. 522.

(13) *Incidental or Necessary Powers,* See C. P. 180.

Appellate Jurisdiction of District Courts.

Const. Art. 111. The District Courts shall have

jurisdiction of appeals from justices of the peace in all civil matters, regardless of the amount in dispute, and from all orders requiring a peace bond. Persons sentenced to fine or imprisonment, by Mayors or Recorders, shall be entitled to an appeal to the District Court of the parish, upon giving security for fines and costs of court, and in such cases trial shall be *de novo* and without juries.

C. P., Arts. 1129, 1136; Broussard, 51 A. 500.

(14) This article does not take away from the Legislature the right to confer other appellate jurisdiction on the District Court. Melies, 117 La. 656, 42 Sou. 109.

Habeas Corpus.

Const. Art. 115. The district judges shall have power to issue the writ of *habeas corpus* at the instance of any person in actual custody in their respective districts.

C. P. 787, 791 et seq.

Lassere, 105 La. 741; Prieto, 52 A. 631, 683.

Jurisdiction as Juvenile Courts. Const., Art. 118.

Jurisdiction of the Civil District Court of Orleans.

Const. Art. 133. The Civil District Court shall have exclusive and general original probate jurisdiction, and exclusive original civil jurisdiction, in all cases where the amount in dispute or the fund to be distributed, shall exceed one hundred dollars, exclusive of interest; and exclusive jurisdiction in suits by married women for separation of property, in suits for separation from bed and board, for divorce, for nullity of marriage, or for interdiction, and in suits involving title to immovable prop-

erty, or to office or other public position, or civil or political rights; and in all other cases, except as hereinafter provided, where no specific amount is in contest, and of all proceedings for the appointment of receivers or liquidators to corporations or partnerships. And said Court shall have authority to issue all such writs, process and orders as may be necessary or proper for the purpose of the jurisdiction herein conferred upon it.

(15) (a) *Probate Jurisdiction.* See note 9, *infra*.

(b) *Jurisdictional Amount.* See note 5, *infra*; Borde, 127 La. 123.

(c) *Title to Office or Other Public Position.* See note 6, *infra*; State, 51 A. 1099.

(d) *Civil or Political Rights.* See note 7, *infra*. Right to register. State vs. Gleason, 112 La. 612.

(e) *Where No Specific Amount Is in Contest.* See note 8, *infra*. To enjoin injury to property rights. New Orleans Baseball, etc., 118 La. 228, 232. In suit of State to inquire into corporate status. State, 107 La. 562. Mandamus to compel employment. Burke, 113 La. 924, 37 Sou. 878. To enjoin removal of a school. Moss, 133 La. 252, 253.

(f) *Receivers or Liquidators to Corporations or Partnerships.* See notes 11 and 12, *infra*.

(g) *By Married Women for Separation of Property, etc.* State, 133 La. 925, 63 Sou. 405.

(h) *Incidental and Necessary Powers.* See C. P. 130.

Art. 127. Relates to jurisdiction of old Parish Courts. Omitted, as Parish Courts have been abolished.

Art. 128. On same subject. Omitted for same reason.

Personal Jurisdiction of District Courts.

Art. 129. District and Parish Courts have no jurisdiction, when actions are brought against persons residing in the State, out of the limit of their respective jurisdiction, except in the cases expressed in this Code.

C. P. 89, 93, 162 et seq., 90.

(1) A State officer must be sued officially at the official domicile. That of the Secretary of State is now East Baton Rouge. *State vs. Foster*, 111 La. 1091. *Contra*, when sued personally. *State*, 33 A. 910; see note 3 to Art. 162.

(2) But a Court having jurisdiction *ratione materiæ* may acquire personal jurisdiction by consent of the parties. *Stackhouse*, 36 A. 529, 531. See note 8 to Art. 162.

For effect of pleading without declining jurisdiction, see Art. 93 and notes.

(3) *The Domicile of a Wife* is that of her husband, and she must be sued there. R. C. C. 39; *Evans*, 8 N. S. 247; see note 4 to Art. 162.

(4) The *exceptions* to the rule stated in this article are too numerous to detail here. They will be treated in proper places when reached in this Code, as far as possible. Arts. 163, 164, 165, and notes. Except in a case expressly provided by law, the process of a court cannot run beyond its territorial jurisdiction. *Thompson*, 127 La. 718, 721; *Amis*, 9 R. 348; *Carrere*, 122 La. 258, 47 Sou. 598; *Gibson*, 14 La. 129; *State*, 111 La. 1091; *Dumas*, 32 A. 679, 682.

Necessary Incidental Powers.

Art. 130. All judges possess the powers necessary for the exercise of their respective jurisdictions, though the same be not expressly given by law.

C. P. 877; Const., Arts. 109, 133, last clause of each; R. C. C. 21.

This article applied to appellate courts. *Dannemann*,

113 La. 277, 36 Sou. 965; Lewis, 131 La. 420, 59 Sou. 837; Rivoire, 104 La. 204, 212; Lazarus, 42 A. 196.

(1) Equitable jurisdiction. Immanuel, 112 La. 362; Clarke, 15 A. 407, 409.

(2) The Court cannot take measures under this article where other remedies are provided by law. Dauphin, 108 La. 535 et seq.

(3) This article has been cited as upholding the right of a District Court to see that its judgments rendered on appeal from Justices of the Peace are enforced in the justices' courts. Babin, 49 A. 1728, 1729. And in upholding the right of District Courts to compel a lower court to grant a suspensive appeal. State vs. Judge, 45 A. 534.

And in upholding the right of a District Court to appoint an auctioneer to pass an act evidencing a sale made by a deceased auctioneer in the execution of its decree. Covas, 45 A. 160, 11 Sou. 874.

And in upholding the right of a criminal court to execute, by seizure and sale, a judgment forfeiting an appearance bond. Arthurs, 43 A. 418.

(4) *Incidental powers.* To fix compensation of expert witnesses, etc. C. P., Art. 462; Act 19, 1884, p. 25.

To hear and determine rule on stenographer to file evidence taken by him in a case tried before the court. State vs. St. Paul, 113 La. 1066, 37 Sou. 972.

To decide rule on provisional officer to pay over money received by him as such. State vs. Judge, 16 A. 416.

To arrest its own process and stay execution, without affidavit or bond, when on the face of the record it appears to have been wrongfully issued. Piernas, 10 A. 286; State vs. Skinner, 33 A. 379; Bledsoe, 33 A. 618.

All such incidental questions are triable summarily. C. P. 755. But judgments rendered summarily are subject to appeal. State vs. Judge, 16 A. 416.

Power to Punish for Contempt.

Art. 131. The judges of the Supreme Court, courts of appeals and district courts have the power to punish

all contempt of their authority by fine not exceeding fifty dollars and imprisonment for a period not exceeding ten days for each offense of that kind. *And provided that no publication or utterance out of court, respecting the conduct of such courts or its officers, jurors, witnesses or parties in any cause after judgment shall be construed to be a contempt and punished as such; reserving to the parties aggrieved their remedies by prosecution for libel or action for damages.*

Italicized portion added by Act 21, 1906, p. 31, which also repeals all laws in conflict with or contrary thereto. This act purports to be passed in pursuance of Art. 177 of the Const. of 1898.

(1) This article does not apply to attorneys at law, who are amenable only to the special laws referred to in Art. 132—viz., Secs. 124 and 125, R. S. *State vs. Williams*, 131 La. 392, 59 Sou. 822.

But all other persons are amenable to it, even a person on trial for crime. *State vs. Hogg*, 126 La. 1053, 53 Sou. 225.

(2) *Contempts, of Two Kinds. Of Criminal Nature.*

(a) Direct, such as are offered in the presence of the Court sitting judicially.

(b) Constructive; such as, though not in its presence, tend to embarrass the due administration of justice. *Fellman*, 116 La. 729; *Junius Hart*, 119 La. 1023.

It is only contempt which is strictly direct, and of which the Judge has personal knowledge, that can be punished instanter, or without trial. *Fellman*, 116 La. 733; *State vs. Judges*, 32 A. 1257; *State vs. Reid*, 118 La. 827, 834, 43 Sou. 455; *Hero*, 36 A. 356.

Constructive contempts can be punished only after full hearing. The proceedings, like other incidental proceedings, are summary, or by rule. The proceeding by rule is criminal in its nature, and subject to restrictions which apply to criminal cases. *Roussel*, 133 La. 154, 176, 62 Sou. 608. Therefore, every presumption favors the ac-

cused. Junius Hart, 119 La. 1017, 44 Sou. 850. And evidence not admitted to show that the language used was justified by the facts. State vs. Reid, 118 La. 827, 834. The proceeding is to vindicate the dignity and authority of the Court, and not for the benefit of the litigants; therefore, husband is proper witness for himself in a rule against him for contempt for failure to obey judgment for alimony. Stoddard, 122 La. 151, 47 Sou. 446. It has been held that defendant may be compelled to answer interrogatories propounded by the Court, without violating his constitutional protection. It is put upon the ground that the interrogatories are intended to enable him to clear himself if he can. State vs. Soule, 8 R. 500, 506. Being criminal in nature, the offense may be pardoned by the pardoning power. State vs. Sauvinet, 24 A. 119. And is not appealable on the ground that offender's liberty is worth over the appealable amount. State vs. Judge, 31 A. 118. Nor on the ground that it is an interlocutory judgment in an appealable case, and would work irreparable injury. State vs. Sheriff, 32 A. 1227.

One brought into court on rule for contempt cannot be called upon to answer for any other act than the one charged in the rule. Otilio, 119 La. 965, 44 Sou. 799.

(3) *Continuance and Repetition of Offense.* Where the offense (disobedience of the orders of the Court) has continued for a number of days, the offender, proceeded against for the first time, cannot be sentenced to ten days imprisonment for each day of disobedience. The limit of the imprisonment that can be imposed at one time is ten days. State vs. King, 47 A. 701, 17 Sou. 288.

But if the offender, having been punished and served his sentence, still refuses to obey the order of court, he commits a fresh offense, and may be ruled, sentenced and punished again and again until he obeys. Heffner, 50 A. 552.

(4) *Power to Compel Delivery of Property or Payment of Money by Contempt Proceedings.* "The defendant in a suit is under no legal obligation to produce property in order that it may be seized under writs of sequestration, provisional seizure or attachment, in the hands of the Sheriff." Nicholls, J., in Ansley, 119 La. 7.

The same applies, of course to *fieri facias*. *State vs. District Court*, 112 La. 183, 36 Sou. 315; *Hero*, 36 A. 352; *State vs. Judge*, 48 A. 1414, 20 Sou. 912.

But when one is shown to have in his possession money belonging to a corporation or partnership to which a receiver has been appointed by the Court, he can be compelled by contempt proceedings to deliver it to the receiver. After the appointment of receiver the money is constructively in the possession of the court. *State vs. Mauberret*, 47 A. 334, 16 Sou. 814. Refusal to deliver is really interference with the possession of the receiver, and anyone, knowing of the receiver's appointment, who interferes with such possession may be punished for contempt. *Blaise*, 124 La. 979, 50 Sou. 816.

And anyone into whose possession money or property has come as an officer of the court can be compelled by contempt proceedings to turn over the same. *Heffner*, 50 A. 552, 49 A. 1443; *Hero*, 36 A. 352.

An order for *alimony* is something more than a judicial recognition of a technical debt. It is the enforcement of the husband's duty to support his wife. Although *fieri facias* is one method to compel its payment, the Court may also compel its payment through contempt proceedings. *Huber*, 49 A. 1503.

But it is not *ipso facto* a contempt for the defendant to fail to pay promptly. He is entitled to a hearing. *Otillio*, 119 La. 985, 44 Sou. 799; *Rivoire*, 104 La. 209.

And defendant will be purged of contempt if it appears that failure to pay was the result of real inability. Same cases. See Act 189 of 1898, p. 435.

(5) This article fixes the limit of sentence which may be imposed. *Rivoire*, 104 La. 204, 213; *State vs. Williams*, 131 La. 394.

(6) *Contempts Under Particular Provisions:*

- (a) By attorneys. C. P. 132; R. S. 124, 125.
- (b) By court officers and jurymen. C. P. 133, 780.
- (c) By witnesses. C. P. 134, 135, 136, 451.

- (d) Violation of injunction. C. P. 308.
- (e) Disobedience of prohibition. C. P. 852.
- (f) Of authority of Justice of the Peace. C. P. 1154.

(7) *Other Matters Which Have Been Adjudged to Constitute Contempt:*

(a) A publication in a newspaper, during the pendency of a civil jury trial, which has a tendency to influence the jurors and prevent the unbiased administration of justice. *State vs. Judge*, 45 A. 1250, 14 Sou. 310.

(b) Disregard, by a lower Judge, of a writ from a superior court. *State vs. Judge*, 48 A. 1501, 21 Sou. 94.

(c) Obstruction or interference by the lower Judge or others in the execution of a judgment of the appellate court. *State vs. Herron*, 24 A. 619.

(d) Refusal of an administrator to obey a peremptory order to file his account within a given delay. *State vs. Judge*, 31 A. 116.

(e) Refusal of party to a separation proceeding to obey order awarding custody of child to other parent *when offender has notice of the order*. *Alverson*, 105 La. 273.

(f) Assaulting the attorney of offender's adversary with a stick, in the clerk's office, in the court building, while the court is in session. *Wood*, 30 A. 672.

(g) Interference with the *proper* execution of legal process. *Junius Hart*, 119 La. 1022.

(8) *Acts Which Have Been Held NOT to Constitute Contempt:*

- (a) Personal difficulty with an officer of the court

not engaged in executing process, or executing it in an improper manner. Junius Hart, 119 La. 1018, 44 Sou. 850.

(b) Injunction by one not a party to the suit to restrain the execution of a judgment of the Supreme Court in so far as it affects his rights. Roussel, 133 La. 154, 62 Sou. 608.

(c) Injunction by a party to the suit to restrain the execution of a judgment of the Supreme Court, on alleged grounds that have arisen since the decision, even though the injunction wrongfully issued. Villavas, 24 A. 213.

(d) Failure to produce books and papers called for by subpoena duces tecum to opposite party. Columbia, 25 A. 283.

(e) Writing a letter to counsel for adversary, criticising a judgment *which has become final*. Fellman, 116 La. 724, 41 Sou. 49.

(f) Continuing by creditors of proceedings in the United States court having possession and jurisdiction of the property of an insolvent, in spite of a stay order granted by a State court in insolvency proceedings. Calder, 45 La. 739, 12 Sou. 950.

(9) *Scope of Review in Supreme Court.* There being no appeal in contempt proceedings, relief must be sought from Supreme Court by one of the supervisory or remedial writs. It was formerly held that the Supreme Court would look no further than to see that the lower Court had jurisdiction; that it would not review the facts constituting the contempt. State vs. Judge, 40 A. 434, 4 Sou. 131; State vs. Monroe, 41 A. 314, 6 Sou. 539; State vs. Judge, 45 A. 1250, 14 Sou. 310.

In some cases, however, in order to determine whether the Court exceeded its jurisdiction, or whether the acts

were really contempt of court, the Supreme Court goes minutely into the facts, as it did in Junius Hart, 119 La. 1018, 44 Sou. 850.

Punishment of Attorneys for Contempt.

Art. 132. Attorneys and advocates, when guilty of contempt of the courts before which they plead, are subject to punishment, pursuant to the provisions of special laws. (To be concluded.)

R. S. 124, 125; State vs. Williams, 181 La. 394.

(1) There is no law or policy which exempts a District Attorney or other officer from being punished for contempt. State vs. Reed, 118 La. 827, 834.

(2) It has been held contempt by an attorney:

(a) To charge the Court with partiality, in a violent and offensive manner. State vs. Williams, 181 La. 394.

(b) To use abusive language towards and to make an assault upon a member of the court, in the courtroom, during recess, in resentment of what had been done on the bench. State vs. Garland, 25 A. 532.

(c) To file an argument in the Supreme Court indecorous and disrespectful to the Court or one of its members. State vs. Redmond, 9 A. 319. Or a petition. State vs. Keene, 11 La. 596; State vs. Grailhe, 1 A. 183; State vs. Soule, 8 R. 500.

(3) It is an *aggravation* of a wanton contempt to file an answer justifying the same. State vs. Garland, 25 A. 532, 534.

(4) An attorney committing contempt in the pleading of his own case may be punished under Art. 181.

State vs. Grailhe, 1 A. 183; State vs. Keene, 11 La. 596;
State vs. Williams, 131 La. 395.

(5) On other matters, see notes to Art. 131.

Officers Responsible for the Collecton of Fines.

Rule to Show Cause.

Art. 132 (Concluded). When a fine is imposed for any cause, the clerk and sheriff, or coroner and marshal, as the case may be, shall be responsible for the faithful performance of their duty in the collection of the same, pursuant to the provisions of special laws; provided that no fine shall be imposed without a rule on the party to show cause, unless the circumstances of the case should in the discretion of the court require no delay.

R. S. 478.

As to rule to show cause, see note 2 to Art. 131.

Punishment of Officers and Jurymen.

Art. 133. Courts of original jurisdiction may fine the officers and jurymen attached to their courts, when they fail to attend, or neglect their duty. In the case of jurymen the fine shall not exceed fifteen dollars for each offense.

(1) Under Sec. 12 of Act 135 of 1898, as amended by Act 113 of 1912, p. 134, the District Judge may enforce the attendance of a juror by a *capias*, and also punish nonattendance by a fine not exceeding \$50 or imprisonment for not more than three days, or both.

But sheriffs and their deputies, coroners and consta-

bles, failing, neglecting, or refusing to execute or serve any order or writ emanating from, or in the name of any court, may, in the cases provided for by special laws, be fined, at the discretion of the judge, in a sum not exceeding five hundred dollars for each offense and imprisonment in the common jail not exceeding thirty days, and suspended from the execution of their offices; and clerks or their deputies, on their failure, refusal or neglect to execute or obey any legal order of the judge, may be fined in a sum not exceeding one hundred dollars, and imprisoned in the parish jail not exceeding ten days.

(2) Judge has a general supervisory control over his officers. R. S. 1953.

(3) Punishment of sheriff, his deputies, coroners and constables. R. S. 1953, 1086.

(4) Punishment of clerks. R. S. 478, 480, 486.

Enforcement of Attendance of Witnesses in Same Parish.

Art. 134. Those courts may enforce the personal attendance of witnesses before them, by having them properly summoned for that purpose, provided that they reside in the parish where the court is held. (To be concluded.)

C. P. 469; R. S. 3941.

(1) Saint Ursuline Nuns excepted. R. S. 3942; Marr's, p. 319.

(2) In criminal prosecutions. R. S. 1086, 1087; Act 67, 1894, p. 78.

(3) Physicians. Act 103, E. S. 1877, p. 177; Marr's, p. 320.

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(4) Personal attendance in Orleans. R. S. 3960; Marr's, p. 320.

(5) Courts must call and hear witnesses present, whether summoned or not. R. S. 3960; Marr's, p. 320.

(6) Right of party to compel personal attendance on oath that presence of witness is necessary to elicit the truth. R. S. 3959; Marr's, p. 319.

(7) Right of party to personal attendance without affidavit where jury is prayed for and granted. R. S. 3959; Marr's, p. 320.

Art. 134 (Concluded). Any witness who may have been summoned to attend any of the courts, to testify in a civil case, and shall have attended, claimed and received a certificate therefor, shall not again be compelled to obey any summons for attending said court in said case at a subsequent term, until he be paid by the party by whom he was summoned.

(8) Sec. 3943, R. S., as amended by Act 28 of 1882, p. 42, reads exactly like this paragraph of Art. 134, and adds the following:

“Provided, said witnesses shall have made a demand for payment in writing upon the party who had him summoned, or his attorney, when he resides out of the parish, not less than thirty days before the first day of said subsequent term at which his attendance may be then required.”

Attachment and Fine of Witnesses.

Art. 135. If a witness who has been duly summoned in a suit, fail to appear personally, the court may order, at the request of either of the parties, that he be

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brought by attachment before them; and if he does not show good cause for not having obeyed the summons, the court may fine him a sum not exceeding one hundred dollars.

(1) It seems that the Court may make and enforce a rule that an attachment will not issue unless the witness has been personally served. *State vs. Stewart*, 117 La. 490; *State vs. Allemand*, 25 A. 526.

Punishment of Witness Who Refuses to Answer.

Art. 136. If a witness summoned in a cause refuse to answer any questions put to him, except such as might lead him to accuse himself of some crime, the court may fine such witness in a sum not exceeding two hundred and fifty dollars, and imprison him for a term not exceeding thirty days.

(1) When the Court is vested with jurisdiction *ratione materiæ* and *ratione personæ*, it is for the Court, and not for the witness, to determine whether the proceeding is correct in form, and the witness may properly be punished for refusal to answer questions propounded, although excepting to the legality of the proceeding. *Dēsina*, 118 La. 283.

(2) This article confers no authority to punish for perjury, which is a felony. *State vs. Lazarus*, 37 A. 401; *State vs. Lazarus*, 37 A. 314. Otherwise with refusal to answer, which is contumacy, punishable under this article. 37 A. 314.

Civil Action Against Same.

Art. 137. The party aggrieved by the refusal of a

witness to answer the questions put to him, has, besides, his action of damage for the loss he may have sustained through his refusal.

Taking Testimony of Witnesses Who Cannot Be Forced to Attend.

Art. 138. Courts may at the request of the parties, address commissions to judges of other courts, justices of the peace, or other persons, to take the deposition of witnesses, or the answers to the interrogatories of the parties residing out of the parish where such courts are held, and even of witnesses residing within the parish, when they are old and infirm or expected to leave the State. The formalities to be observed in such cases are hereafter provided.

C. P. 425 to 440, inclusive.

Court May Compel Party to Bring Into Court Object in Dispute.

Art. 139. Courts may likewise, at the request of either of the parties, order that the other shall bring into court the object in dispute, of which he is in possession, if it be such movable property as can be produced, in order it may be shown by testimony that it is in reality the object claimed; and if the party refuse to comply with the order, that refusal shall be considered as full proof of the identity of the object.

May Compel Party to Produce Books, Papers and Documents.

Art. 140. Courts may also, at the request of one of

the parties, decree that the other party bring into court, the books, papers, and other documents which are in his possession and which are material in the cause, provided the party requesting their production declares in writing and on oath, what are the facts he intends to establish by such books, papers or other documents; and on the refusal of the party thus called upon to comply with the order of the court, the facts stated and sworn to shall be considered as having been confessed, unless satisfactory evidence be shown of the impossibility of producing such documents.

C. P. 473.

(1) *Facts Taken for Confessed.* The allegation that a party "intends to establish all the allegations" of his petition, answer or opposition by such papers and documents is too general to permit a taking for confessed. *Gottlieb*, 128 La. 697, 701, 703; *Mills*, 30 A. 827. But facts specifically alleged will be taken for confessed on refusal to produce. *Mills*, 30 A. 824, 827.

(2) *Party to the Suit.* The Supreme Court seems to say in *Equity Co.*, 115 La. 848, that a garnishee under *feri facias* not being a party to the original suit, this article has no application to him. This must be an inadvertence on the part of the Court; for, while such a garnishee is not a party to the original suit, he is a party to the new and distinct proceeding which garnishment under *fi. fa.* is held to be. *Bank*, 50 A. 1110. Therefore, we can see no reason why this article should not apply to the parties to such a proceeding.

The attorney of a party, employed in the case and having a document in possession as such attorney, is treated as a party, and may be called on to produce it. *Travis*, 3 R. 227, 230.

(3) *Further Opportunity to Produce.* If the party ordered to produce except in good faith to the order, and his exception is overruled, he should be given further opportunity to produce. Equity, 115 La. 848. And on trial de novo in an appellate court it is in the discretion of the latter to permit the production of the documents in evidence, although the lower Court has rendered judgment pro confesso for failure to produce the same. Equity, 115 La. 847.

(4) *Appeal from Order.* The order, being interlocutory, cannot be appealed from unless it clearly appears that it can work an irreparable injury. Marks, 108 La. 494, 496; Horton, 14 A. 142.

(5) *Day to Produce.* Article 473 provides that the books, etc., be ordered produced on the day fixed for the trial, and it has been inadvertently held that no other day could be fixed in the order. Murison, 18 A. 204; Gottlieb, 128 La. 704. But the Murison case was overruled on rehearing. Murison, 18 A. 296. And the overruled opinion was inadvertently cited in the Gottlieb case. Arts. 140, 473 and 143 must be construed together, and the weight of authority is that the day to be fixed for production is in the discretion of the Court, and not necessarily the day of trial. Marks, 108 La. 494, 496; Murison, 18 A. 300.

(6) *Description of Documents Called For.* Art. 473 requires that the order describe the books, etc., called for. A general order for "all of the books," etc., will be relieved against if timely objection is made. But if the party produce the books without objection, no relief can afterwards be obtained on this ground. State vs. Judge, 104 La. 301, 305.

But it has been said that if the transaction involved is a mercantile one, all the books, etc., of the merchant should be called for, and not isolated ones. Flower, 7 R. 205, 206.

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(7) *When Order Granted.* At any time before trial; and even during trial, unless it appear that the trial will be unduly delayed or interfered with by the late order. Wolff, 47 A. 548, 17 Sou. 126. C. P., Art. 475. But the party calling for documents during trial must comply with requirements of this Art. 140. Imhof, 45 A. 706, 715; Richardson, 26 A. 651, 654.

(8) *Grounds for Not Producing.* It is not a good ground for objection to produce that the party having the documents in his possession is not a competent witness in the case, and could not explain them. Imhof, 45 A. 706, 715. Nor that the books ordered to be produced are the books of a merchant who could not offer them in his own favor. R. C. C. 2248; Martinstein, 8 R. 6, 8; Flower, 7 La. 198, 205. Or that the books, etc., would not be legal evidence. Flower, 7 La. 198.

(9) *Limitations of This Article.* It was held in Cooper, 2 A. 158 (at p. 160), that when a party lives out of the parish where the court is held he cannot be compelled to bring his commercial books from his domicile to the court. This is affirmed in Ludeling, 4 A. 534 (at p. 537), and it is there further held that in such a case the party may be required to file a sworn copy of a designated account from his books. And the same is held in Murison, 18 A. 301. And these decisions are all affirmed in Cain, 34 A. 511, 515. But if the books are in the parish where court is held they may be ordered produced, although party's domicile is in another parish. State vs. Judge, 104 La. 301, 304.

(10) *The Penalty for Failure to Produce* is taking for confessed, and not punishment for contempt. Columbia, 25 A. 283, 284. But if the party answer, denying that the document is as the mover alleges, but that, such as it is, it has been lost or mislaid, the Court cannot take pro

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confesso without traverse of the answer and evidence taken. Romero, 113 La. 110, 120.

If the trial is by jury, on refusal to produce, the affidavit of mover is read as evidence to the jury. Flower, 7 La. 198, 205. With proper instructions, of course.

See, also, Atwater, 18 A. 226.

Only facts specifically alleged taken pro confesso. Note 1.

(11) A party cannot prove the contents of a deed in the possession of his adversary by secondary evidence until he has used the means provided by this article. Williams 12 A. 91, 92.

We suggest that after compliance with this article the party would not want to prove, but to take pro confesso.

(12) *Compliance with Order.* Not a compliance to bring books sealed to clerk of court and instruct him to let no one look at them. Skillman, 10 La. 103, 107. Nor to produce other documents than the ones called for; but in this case it is for the mover to show that the order is not complied with. Kees, 4 R. 16.

May Compel Third Person to Produce Documents.

Art. 141. Courts may also, at the request of either of the parties in a suit, order a third person, having in his possession papers, titles, acts, or documents, which may be important in the decision of a cause, to bring them into court on the day fixed for the trial.

C. P. 474, 475.

(1) A party may sometimes be required to do more than merely have a subpoena duces tecum issued to en-

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title him to a continuance if the books called for are not produced on the day of trial. Certain circumstances require greater diligence on his part. Slidell, 18 La. 461, 463.

Notaries Not Bound to Produce Their Original Records.

Art. 142. Nevertheless, notaries are not bound to produce the record of acts passed before them, of which authentic copies may be obtained, except when it is necessary to prove the genuineness of the signatures affixed to them.

Mode of Compliance With Order to Produce.

Art. 143. When a party or a third person has been ordered to produce some books, deeds, or other documents, he must deliver them previous to or on the day fixed for the trial, to the clerk of the court, who shall receipt for them, have charge of them, and return them again to the party to whom they belong, after the cause shall have been decided.

See notes (5) and (12) to Art. 140.

Other Powers.

Art. 144. Courts have power to order the arrest and imprisonment of the parties, attachment in the hands of third persons, sequestration, execution, and sale of their property, in the manner and in the cases hereafter pro-

vided; and they possess, besides, the other powers especially delegated to them by the provisions of the present Code.

Arrest. Art. 210 et seq.

Attachment. Art. 239 et seq.

Sequestration. Art. 269 et seq.

Execution. Arts. 617 et seq., 732 et seq.

Sale. Art. 663 et seq.

May Make Its Own Rules.

Art. 145. The Courts are authorized to enact, respectively, rules establishing the mode of proceeding before them in all cases not provided by this code, provided the same be not contrary to the rules here prescribed.

(1) Act 163, 1898, Sec. 4. The rules should be hung up in the courtroom. R. S., Sec. 1935.

Civil District Court, Orleans. Const. 136; Act 59, 1872; Marr, 1026.

(2) The appellate court will not take judicial notice of the rules of the lower court, but will presume, unless the contrary appears, that the lower court followed its rules. State vs. Arbuno, 105 La. 719.

(3) Rules of court yield to the law. State vs. Clerk, 47 A. 358, 17 Sou. 48. But the Supreme Court will not interfere with them unless contrary to law or work injustice. State vs. Wagner, 42 A. 55, 58; Green, 15 La. 154. But courts should relax the strict observance of their own rules when the circumstances of a particular case require it; and the Supreme Court, although it holds the rule to be a proper one, will order it to be violated in a particular case if its enforcement would work injustice. State vs. Judge, 50 A. 1125.

(4) Rules of court must be limited to their proper scope; that is, to mode of procedure, conduct of business or regulation of practice in the court; as the mode of setting causes for trial, and the like. They cannot be legislative. Therefore, they cannot make a cause appealable. *Bell*, 11 La. 124. Or take away the right to a hearing on appeal. *State vs. Judges*, 37 A. 396, 398. Or to a rehearing. *State vs. Judges*, 37 A. 595. Nor make the cost of printing briefs taxable as costs. *Stewart*, 42 A. 37.

CHAPTER II.

Of the Ordinary Proceedings.

Definition and Application.

Art. 146. The word proceeding, in its general acceptance, means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgment and of executing them.

The forms are different in ordinary, executory and summary proceedings.

C. P. 97, 98.

Ordinary. This chapter.

Executory. C. P. 732 et seq.

Summary. C. P. 754 et seq.

SECTION 1.

Of Demand, and of Cumulated Actions.

Definition of Demand.

Art. 147. A demand means a civil action brought before a court of justice to obtain a thing to which one thinks himself entitled.

Cumulation of Actions.

Art. 148. Separate actions may be cumulated in the same demand, except in the cases hereafter expressed; this is termed *cumulation* of action.

C. P. 151. Consolidation of suits. C. P. 422.

(1) *Multifariousness* is another name given to the cumulation of actions; or, more properly, it is the name given to such cumulation as is objectionable and not permitted. Cumulation is of two kinds: first, that permitted in this article and limited in its scope by the three succeeding articles; and, second, the joinder of several parties as plaintiffs or as defendants, or both. This latter kind is nowhere treated in this Code, and this is as proper a place as any other to touch upon this important subject. Finegan, 135 La. 482.

(2) *Joinder of Parties.* This subject is more fully treated in the case of Gill et als. vs. Lake Charles et al., 119 La. 17, 43 Sou. 897, than in any other decision of our Supreme Court. The opinion in this case should be carefully read. Many cases from this and other jurisdictions are reviewed. We will not cite here any case cited in this opinion, as they are digested therein.

The general rule as evolved in the opinion is that a multiplicity of actions is to be avoided, and for that reason joinder of parties as plaintiffs or defendants is to be encouraged; but that parties cannot be allowed to join as plaintiffs unless they have a common interest in the matter at issue, or be joined as defendants unless they have a like interest or a common defense.

The reason for the limitation of the right of joinder of parties is apparent. It would tend to confusion to try various issues between different parties in the same suit; and it would be unjust to compel a defendant to come into

court and hear evidence upon a cause with a large part of which he has no connection whatever. Davidson, 126 La. 545.

As may be plainly seen, no precise rule can be laid down, and much is left to the discretion of the Court in many cases.

It may be of assistance to subjoin cases not cited in the Gill case, *supra*, where joinder of parties has been allowed and where it has been denied.

(3) *Joinder of Parties Not Allowed; Misjoinder.*

(a) A plaintiff cannot in the same suit sue different parties for different amounts claimed from each under a separate contract. Wilterhaler, 119 La. 125, 43 Sou. 980; Jones, 114 La. 996, 38 Sou. 763; Broadwell, 28 A. 172; Tague, 38 A. 456; Darden, 180 La. 998, 58 Sou. 857.

(b) Nor can distinct creditors under separate contracts join as plaintiffs. Jones, 114 La. 996, 38 Sou. 763; Blum, 111 La. 1092, 36 Sou. 202; State vs. Judges, 105 La. 333.

(c) Two or more trespassers upon the same land cannot be joined as defendants unless the petition shows that they were joint trespassers. Breaux Bridge, 121 La. 188, 46 Sou. 206. And so with any other tortfeasors. Cane, 34 A. 1096, 1097; New Orleans, 32 A. 1165; Cline, 41 A. 1031. See note 4, (i), *post*. Courtney, 131 La. 575, 578.

(d) Nor can an action on a contract against one party be joined with an action for tort against another. Neugass, 43 A. 82. Except when. See note 4, (b), *post*.

(e) The pledgee of a note cannot in the same suit sue on the note and for the debt for which the note

was pledged, where the maker and the pledgor are different persons. Forstall, 47 A. 105, 16 Sou. 651.

(f) Plaintiff in petitory action cannot join as defendants different persons, each in possession of a different portion of the land sued for, where they do not derive title from a common author. Southern, 109 La. 453. See note 4, (d), post., for the converse. See Davidson, 126 La. 542, 52 Sou. 759.

For disposal of case on misjoinder, see note 10, post.

(4) *Joinder of Parties Allowed.*

(a) All parties to the same contract, though each is sued for a different amount. There is unity of defense. Dilzell, 120 La. 274, 45 Sou. 188; Huston, 10 A. 771; Union, 113 La. 436, 447. Or quasi-contract. Clarke, 35 A. 451. To set aside contract. Bienvenue, 126 La. 1103, 1105. Principal and surety. 32 A. 1076, 1080.

(b) One can be sued on a contract and another for tort in the same action if the claims arose out of the same transaction. Briel, 112 La. 417; Holzap, 38 A. 187; Riggs, 39 A. 1031; Conery, 33 A. 372; Arrowsmith, 17 La. 420.

(c) Several creditors may join in a revocatory action and may make defendants all who are charged with complicity. Marx, 50 A. 1229; Mechanics', 33 A. 349; Blum, 111 La. 1093, 36 Sou. 202.

(d) In petitory action, where defendants possess without title. They have a common issue in resisting plaintiff's title. Vicksburg, 46 A. 1237, 1240. And also where defendants hold from a common author. Derbes, 28 A. 644; Gaines, 2 How. 619. See note 3, (f), ante. Ross, 46 A. 1250, 1254.

(e) All sufferers from the same tort may join in an action for damages resulting therefrom. *Clairain*, 40 A. 178, 3 Sou. 625; *Curley*, 40 A. 813; *Williams*, 51 A. 185, 187; *Eichorn*, 112 La. 251. The foregoing are all cases where widow was suing for herself and as tutrix of her children for damages for death of husband and father. But the principle is the same as to any other co-plaintiffs unless the defendant has different defenses to the claim of each. In *La Groue*, 114 La. 253, husband and wife were permitted to join in a suit for damages suffered by each from the same tort. The plaintiffs in the foregoing cases derived their claims from injury to or death of the same person, and their claims were closely related. In *Bowman*, 27 A. 501, 502, several plaintiffs, not related, were permitted to join in an action for damages for the same tort. And so in *Armstrong*, 46 A. 1448, 16 Sou. 468. And in *Hotard*, 36 A. 450. And in *Madere*, 126 La. 342, 346.

(f) Two or more taxpayers may unite in a suit against a municipal body for illegal action which prejudices them. *Johnson*, 105 La. 149; *Gill*, 119 La. 17.

(g) The insured and the assignee of his policy can join in a suit to have their rights under the policy recognized. Sufficient unity of interest. *Elgutter*, 52 A. 1733. Also insured and beneficiary. *McClelland*, 107 La. 124.

(h) It was decided in *Favrot*, 30 A. 606 that several judgment creditors holding judgments against a parish cannot join in a suit to compel the Police Jury to levy a tax to pay the several judgments. But we submit that, if the proceeding was a proper one for each acting individually, it was proper for them to join, under the general princi-

ples which have controlled in the cases cited in notes 2, 3 and 4, *infra*.

(i) Participants in the same tort may always be joined as defendants in suit for same. *Cline*, 41 A. 1041; *State vs. St. Paul*, 110 La. 722; *Clement*, 12 A. 599; *Williams*, 117 La. 601; *Standard*, 130 La. 149, 155. And in suit to prevent same. *Luchini*, 126 La. 972, 53 Sou. 63; *Planters'*, 52 A. 1243.

(5) *Right to Severance, or Separate Trial*. It is a matter within the discretion of the trial Judge to grant or refuse a separate trial to defendants who have been joined in a suit. *Clement*, 12 A. 599; *State vs. St. Paul*, 110 La. 722, 34 Sou. 750; *Arrowsmith*, 17 La. 420, 421.

In *Holzab*, 38 A. 185, it was held that permitting defendants to sever cured any possible objection there might have been to their being joined in the action.

The right to a severance seems to be recognized, under the circumstances, in *Riggs*, 39 A. 1030, 1031; and it was held that it was optional with defendants. But see 110 La. 725.

(6) *Jurisdictional Amount, Appellate and Otherwise, Where Joinder*. Where joinder of plaintiffs is rightfully permitted, the aggregate amount of their claims determines the appellate jurisdiction. *Bowman*, 27 A. 501; *Armstrong*, 46 A. 1448, 16 Sou. 468; *La Groue*, 114 La. 253, 256.

But where the defendants are wrongfully joined, the aggregate amount is not the test of appellate jurisdiction; but rather the amount of the claim against each defendant is. *Broadwell*, 28 A. 172; *Tague*, 38 A. 456; *State vs. Judges*, 105 La. 333; *Sewerage*, 117 La. 923, 42 Sou. 426; *Southern*, 109 La. 453, 33 Sou. 559; *State Nat. Bank*, 39 A. 806, 2 Sou. 600. And likewise where several plaintiffs join on distinct claims. *Landry*, 104 La. 757.

See, also, *Marx*, 50 A. 1230, 1235; *Louisiana Western*, 33 A. 806.

(7) *Harmless Joinder.* If one of the plaintiffs has a cause of action distinctly set out, the joinder of an unnecessary party as plaintiff will not dismiss the suit as to him. Thus, where the husband sues on a community debt, the joinder of the wife with him is surplusage. McClure, 104 La. 498; Cooper, 29 A. 213; Williams, 52 A. 1427; Barton, 12 A. 333; Holzap, 38A. 188. In other cases. St. Geme 117 La. 232, 237; Lewis, 109 La. 1030, 1035; Bank, 133 La. 494.

Where one of the plaintiffs was afterwards deprived of all interest in the suit, not dismissed, but continued as to other. Wiemann, 112 La. 305, 36 Sou. 358.

(8) *Not Necessary Parties.*

(a) The executor named in a will may defend it alone. Those claiming under it not necessary parties. Coulter, 7 A. 397; Theriot, 114 La. 612, 618.

(b) A party may sue on a contract without joining another party with whom he has agreed to divide his interest in the contract. Torian, 46 A. 1503, 16 Sou. 405.

(c) A mere simulated transferee need not be joined. Janney, 36 A. 118. Nor defendants' vendor where sale not attacked. Hoffmann, 110 La. 1070, 35 Sou. 293.

(d) It is not necessary that all joint obligors or all joint obligees be joined as plaintiffs or as defendants, as the case may be. R. C. C. 2081, 2085; Act 103, 1870, found in Acts 1871, p. 18, Sec. 2; Hincks, 38 A. 873; Police Jury, 116 La. 286; Heirs of Hickman, 12 A. 268; Skipwith, 34 A. 28; Tugwell, 32 A. 848; Glasscock, 33 A. 584, 586; Burney, 41 A. 627, 632. Father and mother in suit for death of son. LeBlanc, 129 La. 196, 56 Sou. 761.

(e) Likewise with *debtors in solido*. Shreveport, 131 La. 933, 60 Sou. 621.

(f) In a suit to remove an obstruction to a natural drain, against a proprietor below, the drainage district in which situated is not necessary party, nor are other proprietors above or below. *Robertson*, 132 La. 319, 61 Sou. 388.

(9) *Disposal of the Case on Misjoinder.* Where the exception of misjoinder has the same application to one of the joined parties as to another, the Court can do nothing but dismiss the case on sustaining the exception. *Davidson*, 126 La. 542, 547.

Where, however, the exception is aimed more particularly at one of the parties, the Court will dismiss the suit as to him, and continue what remains. *Darden*, 130 La. 1001.

The student who wishes to pursue this inquiry further might examine the cases cited in note 3, *infra*, and see what disposition was made of the cases.

(10) *Necessary Parties: Nonjoinder.* To finally decide and determine certain matters, it is necessary to have particular parties before the court. Courts cannot be required to decide cases piecemeal, or to expose themselves to the risk of rendering contradictory or unavailing judgments. The Court will, *ex proprio motu*, notice the absence of necessary parties. *Willis*, 42 A. 876, 880; *Blum*, 111 A. 1092, 36 Sou. 202; *Vicksburg*, 45 A. 621, 12 Sou. 743; *Hyde*, 10 R. 387; *Ashbey*, 41 A. 138, 5 Sou. 546.

(a) All the parties to sales or other contracts are necessary parties to a *suit to annul* the same. *Blum*, 111 La. 1092, 36 Sou. 202, and cases cited; *Burney*, 41 A. 627, 6 Sou. 248; *Latour*, 134 La. 342, 64 Sou. 133; *Dunham*, 133 La. 213, 215; *Fecel*, 32 A. 91; *Stockmeyer*, 32 A. 106.

And to annul a judicial sale the adjudicatee is necessary party. *Smith*, 37 A. 122.

So, in an action for the resolution of a sale, all parties necessary. Bankston, 117 La. 1054, 42 Sou. 500. And to correct an error. Bonvillain, 117 La. 794, 816.

Revocatory action. Troustine, 39 A. 939; Black, 38 A. 696; Miltenberger, 31 A. 259; Zimmerman, 28 A. 454; Hyde, 10 R. 388; Seixas, 39 A. 510, 513; Lawrence, 6 R. 21.

(b) In *partition*, all co-owners are necessary parties. Bothick, 109 La. 1, 33 Sou. 47. If one is missing, all proceedings are null, even between those who were parties. Smith, 131 La. 970, 60 Sou. 634; Ware, 35 A. 288; Union Bank, 47 A. 636; Gibbs, 47 A. 766; Savage, 15 A. 250.

(c) *One's title to property* cannot be inquired into in a suit to which he is not a party. Byerly, 118 La. 265, 267; Ricard, 27 A. 365; Adler, 36 A. 175, and cases cited. Nor his possession. Ricard, 27 A. 365. Title to a judgment. Bothick, 34 A. 907. Shares of stock. Reid, 32 A. 546; De St. Rome, 34 A. 422; De St. Rome, 20 A. 383. Fee. 35 A. 413.

The pledgee of a mortgage note is a necessary party to a suit to annul the mortgage. Theriot, 125 La. 363, 51 Sou. 292.

(d) *An order granting a respite* is a judicial contract among the debtor and his creditors, and one cannot sue to annul it without making the other creditors parties. Vicksburg, 45 A. 621, 12 Sou. 743; Andrus, 45 A. 1070; Block, 46 A. 1104, 1111; Kelley, 51 A. 195.

(e) *Distribution; Concursus; Insolvency.* All claimants interested in a fund in the hands of the court should be made parties to a proceeding for its distribution. Citizens' Bank, 40 A. 149, 3 Sou. 538.

In insolvency, all creditors. Conrey, 8 La. 371. See Lauterbach, 125 La. 839, 51 Sou. 1008; see Louisiana Board, 31 A. 305.

(f) The *one from whose property* a judgment will have to be paid is a necessary party to the proceeding to obtain the judgment. Driscoll, 117 La. 264, 41 Sou. 568; Hughes, 23 A. 682; Jones, 114 La. 996, 38 Sou. 763; O'Bryan, 26 A. 608.

(g) And likewise the *party most interested* in the subject-matter of the suit is a necessary party. As the corporation, in a suit concerning its property or membership. Ross, 9 A. 337. The mortgagee, in a suit to erase the mortgage. Ashbey, 41 A. 138, 141; State vs. Recorder, 21 A. 401; Hearing, Manning, 33; Pickett, 28 A. 846; Chaffe, 30 A. 1307, 1311; Morris, 34 A. 665. But where the mortgagee has no interest, as where the notes have been paid, and where it is the clear duty of the recorder to cancel, he will be mandamus'd so to do, without making the mortgagee a party. Erwin, 5 A. 2, 4; Lanaux, 36 A. 975; Willis, 41 A. 694, 6 Sou. 730.

Upon this principle, the creditor, to pay whose judgment a tax has been levied, is a necessary party to a suit to enjoin the collection of the tax. Shields, 31 A. 765.

And in a suit for appointment of liquidator to a partnership, all partners, or their heirs or representatives, must be made parties.

All parties in interest. Vandine, 26 A. 388.

(h) To annul a judgment or to appeal from it, all parties to the judgment are necessary parties. Gremaud, 115 La. 79, 38 Sou. 901; Morris, 30 A. 878; Willis, 26 A. 156.

(i) The legality of an act of a Police Jury can-

not be inquired into in a proceeding to which the Police Jury is not a party. Egan, 39 A. 967, 3 Sou. 85.

(11) *Disposal of Case on Nonjoinder.* The Court will, as seems to it most proper, either render judgment of nonsuit or give opportunity to bring in the necessary parties. The cases cited in note 11 may be examined to see what disposition was made in each case according to the circumstances.

But the Court can never force a defendant upon a plaintiff, the plaintiff having in every case the right to say whom he will sue or not sue. St. Charles, 109 La. 497.

Cumulation Not Permitted, When; Examples.

Art. 149. The plaintiff is not allowed to cumulate several demands in the same action, when one of them is contrary to or precludes another.

As when one has bought a thing in the name of another, and with his funds, without his authorization, the person for whom the purchase has been made, can not demand, by the same action, both the thing bought in his name and the money employed for paying the price.

Nor can a vendor demand, at the same time, the rescission of the sale he had made and the price for which it was made; he must decide for one or the other of the two causes of action, as the one precludes the other.

(1) Proceedings on improper cumulation. Art. 152.

(2) Other inconsistent demands:

(a) Demand for the annulment of a judicial sale, and demand for the proceeds of such sale. Campbell, 37 A. 323, and authorities there cited; Ouliber, 16 A. 287; Mather, 34 A. 410; Theurer, 24 A. 597.

And so in private sale with demand for rescission and demand for price. Cochran, 38 A. 525. Specific performance and damages. Sondheimer, 121 La. 786.

(b) Demand to be decreed the owner of property, and demand for recognition of lien or privilege upon the same property. Adler, 36 A. 169; Cohen, 41 A. 545, 6 Sou. 472.

(c) Demand to be recognized as sole heir accepting purely and simply, and demand to be appointed administrator. Berfuse, 34 A. 599.

(d) Demand to have sale declared a mortgage, and the demand to rescind for lesion. Bonnette, 111 La. 855, 35 Sou. 953.

(3) *Inconsistent Grounds.* Upon the same principle, a demand cannot be based upon two or more inconsistent grounds; as:

(a) Demand for rescission, upon nonpayment of price and lesion. Parker, 37 A. 22, 25.

(b) Demand for a fixed sum, on one ground or another, without alleging or proving which. Lazarus, 117 La. 711, 42 Sou. 230.

(c) Demand for money, upon purchase of note, and upon subrogation by payment of the note. Weil, 42 A. 492, 496.

(4) *Demands Inconsistent With the Form of Proceeding.* Some demands, while perhaps not inconsistent with other demands, have been held to be inconsistent with the proceeding in which they were urged. Thus, in an opposition to an administrator's account the opponent cannot:

(a) Demand property claimed to be in the possession of administrator, but belonging to opponent.

Blancand, 48 A. 578, 581; Sanchez, 41 A. 504, 6 Sou. 791; Troxler, 46 A. 738, 747, 749; Cathey, 15 A. 228.

(b) Demand the nullity of the sale of succession property. Scott, 41 A. 668, 6 Sou. 792.

And in a proceeding against an executor to annul the will and have plaintiff declared sole heir, questions of title to specific property should not be engrafted on the proceeding. Vidal, 44 A. 41, 10 Sou. 414.

Demands against an executor in his personal capacity should not be brought in the succession proceedings. Kranz, 117 La. 647, 42 Sou. 197.

(5) *Pleading in the Alternative.* Demands which would otherwise be deemed inconsistent may be pleaded in the same suit, provided it is done distinctly in the alternative. Dilzell, 120 La. 279, 280. Examples of this are:

(a) Revocatory action, and action en declaration de simulation. Harrison, 52 A. 707, 708; Chauffe, 34 A. 684; Johnson, 30 A. 1203; Payne, 106 La. 86, 30 Sou. 263; Coleman, 106 La. 194, 30 Sou. 99.

These demands have been cumulated, not in the alternative, where the other side failed to make timely objection. Mackesy, 38 A. 385; Goothye, 111 La. 770; Hoffman, 110 La. 1075; Morris, 39 A. 720.

It was held in Brown, 30 A. 966, that the allegations that a transfer of property is a simulation and that it is a donation in disguise are inconsistent. Exactly the contrary is held in Villars, 34 A. 198, 200.

(b) Demand for property, and, in the alternative, its value. Maduel, 30 A. 1404; Nouvet, 15 A. 293; Burney, 47 A. 91.

(c) Demand for the whole succession, or, in the alternative, the legitime. Hollingshead, 16 A. 334.

(d) Demand for cancellation of assessment, and, in the alternative, for its reduction. New England, 121 La. 1069, 47 Sou. 27.

(e) Demand for absolute divorce, and, in the alternative, for separation from bed and board. Mack, 39 A. 494.

(f) Demand that property standing in the wife's name be declared paraphernal, and, in the alternative, in the event that it is held to be community, that it be declared exempt from seizure under the homestead law. Knight, 105 La. 35.

Petitory Action Excludes the Possessory.

Art. 150. In possessory actions, one can not claim, at the same time, both the possession and the ownership; if the two are demanded, it shall be presumed that the possessory has been relinquished in order to resort to the petitory action.

See Arts. 54, 55 and 57, and the notes thereto.

(1) In Baldwin, 130 La. 712, the action was possessory, and, *in the alternative*, petitory. It was held that plaintiff should have been required to elect between the two, and, on failure to do so, his suit dismissed. No reference was made in the decision to either this article or Art. 54, but Art. 152 was alone referred to and followed. If this ruling is correct, it must be on account of the demands being made in the alternative; for otherwise both this article and Art. 54 would require that the action be treated as petitory only. See notes 2 and 3 to Art. 152.

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(2) *Jactitation or Slander of Title* being a form of possessory action, it cannot be cumulated with the petitory: Bossier's, 119 La. 500, 44 Sou. 278. Query: Why was not this article and Art. 54 applied and the action considered petitory only? Answer: Perhaps on account of the conflicting demands for damages for trespass based partly on ownership and partly on possession. See action for trespass, ante. See note 15 to Art. 55.

When Cumulation Permitted.

Art. 151. If the Plaintiff has several causes of action tending to the same conclusion, not contrary to nor exclusive of each other, though they arise from different contracts, he may cumulate and bring them in the same suit; as, for example, if one claim from another one hundred dollars in virtue of a sale, and one thousand dollars in virtue of a loan, or if he claim a movable from another both by inheritance and by purchase.

(1) The terms of Art. 148 seem to allow a wider range to cumulation than does this article.

(2) The policy of the law being to permit cumulation of demands between the same parties, when not inconsistent, in order to avoid a multiplicity of actions (Leverich, 15 A. 310, 311), the instances where it has been permitted are almost too numerous for citation. The question has, however, been frequent subject of adjudication, and we append a list of examples.

(a) Partition with petitory action. Durbridge, 43 A. 504, 9 Sou. 95; LeBlanc, 41 A. 1023; Morris, 34 A. 204.

(b) Recognition as heir, account of administration, and property in hands of the curator. Miller, 20 A. 577, 579.

(c) Entry upon land, taking of trees, and ownership of staves. Tensas, 132 La. 1022, 1025.

(d) Specific performance of several distinct adjudications at same sale. Michenor, 49 A. 360.

(e) Restitution of price, and correction of error in description of property. Bonvillain, 117 La. 794, 42 Sou. 273.

(f) Recovery for cattle killed at different times. Learned, 128 La. 430, 54 Sou. 931.

(g) Wages as overseer, value of crops, supplies and money furnished, use and hire of teams, and board of laborers. Torian, 46 A. 1502, 16 Sou. 405.

(h) Personal property and damages for its seizure. Hodge, 105 La. 669.

(i) Partition of plantation and settlement of accounts. Bayly, 35 A. 778.

(j) Damages *ex delicto*, and damages *ex contractu*. Enders, 35 A. 1002.

(k) Injunction of the execution of two separate judgments. Medart, 15 A. 622.

(l) Definite sum and settlement of partnership. McNair, 40 A. 353, 4 Sou. 310.

(m) Dissolution of lease and rent. Fox, 31 A. 67.

(n) To have existence of partnership declared and procure its liquidation. Mills, 30 A. 824.

(o) Petitory action for one tract of land, and for slander of title of another distinct tract. Williams, 12 A. 873.

(3) *Not Obligated to Cumulate.* But, although plaintiff is permitted to cumulate his several demands in the

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same suit when not inconsistent, he is not obliged to do so. Dimmick's, 111 La. 658.

(4) *Effect of Judgment on One Demand.* When demands are cumulated in same suit, a judgment dismissing one or more of them, but leaving one or more still pending, is not a final judgment, but only an interlocutory one; and, therefore, is not appealable unless it would work an irreparable injury. Bossier's, 117 La. 221, 226.

Proceedings Where Demands Are Inconsistent.

Art. 152. When two causes of actions, contrary to and exclusive of each other, have been cumulated in the same demand, the defendant may refuse to plead to the merit until the plaintiff have made his choice as to which of the two he means to proceed with; and if the exception be sustained by the court, the plaintiff shall be bound to amend his petition so as to preserve only one cause of action; otherwise his suit shall be dismissed with costs.

(1) It is generally held that a motion by defendant to compel plaintiff to elect, being a dilatory exception, comes too late after answer filed. Maissonneuve, 133 La. 666, 63 Sou. 261; Lotz, 10 A. 20; Stewart, 10 A. 218; Gribble, 14 A. 793; McKoy, 8 A. 48.

(2) It does not seem that this article should apply to the cumulation of the possessory with the petitory action, as in that case it is expressly provided that the petitory excludes the possessory. Arts. 54, 150. It has, however, been twice applied to such a cumulation, whether by oversight or not, we cannot say. Maissonneuve, 133 La. 666, 63 Sou. 261; Baldwin, 130 La. 712. See note (1) to Art. 150.

(3) *Pleading in the alternative* is in itself an elec-

tion as to which demand the plaintiff stands upon in the first instance, and usually in such case there can be no ground for a motion to elect. Dilzell, 120 La. 279, 280; Smith, 27 A. 98.

This makes us the more to wonder at the ruling in Baldwin, 130 La. 712, where the petitory was cumulated in the alternative with the possessory. See note 2, *infra*; note 1 to Art. 150.

Perhaps the solution is that making the demands in the alternative is not demanding both at the same time, and that, therefore, the petitory could not be held to prevail and exclude the other.

Art. 153. Demands are *Principal* or *Incidental*.

The principal demand is that by which the suit is commenced in court; and for this reason it is also termed *ordinary demand*.

An incidental demand is that which is made before issue joined, in order to obtain something relating to the principal object of the suit; such are demands in warranty or in intervention.

(1) *Incidental Demands by Plaintiff.* These are probably not the incidental demands referred to in this article, for they really usually form part of the ordinary demand, as above defined, but they have been styled incidental demands in the reports. For example:

(a) A demand for separation of property may, in a sense, be said to be incidental to a demand for separation from bed and board. Williams, 43 A. 869.

(b) A demand for fruits and revenues of the land in question is said to be incidental to a demand in revendication. Winter, 6 R. 466; Maduel, 30 A. 1405.

(c) Garnishment under attachment is incidental

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to the main suit, but not so with garnishment under fieri facias. *Marquezee*, 29 A. 194.

(2) *Incidental Demands by Defendant.* C. P. 362, 363.

(a) In compensation. See C. P. 366 et seq.

(b) In reconvention. See C. P. 374 et seq.

(c) In warranty. See C. P. 378 et seq.

(3) *Incidental Demands by Third Persons.* C. P. 364.

(a) Intervention. See C. P. 389 et seq.

(b) Third opposition. See C. P. 395 et seq.

Decision of Incidental Demand: Jurisdiction.

Art. 154. The principal demand must be brought before the court which has the jurisdiction of the case.

The incidental demand must be decided at the same time with the principal; it is subject to the same jurisdiction as the suit itself.

(1) See notes to preceding article. Incidental demands by defendant and by third persons will be fully treated, when reached, under their respective heads, as indicated supra.

(2) *Jurisdiction of Incidental Demands by Plaintiff.*

(a) Garnishment under attachment being incidental to the main suit, the garnishee, wherever he resides in the State, must submit to the jurisdiction of the court where the main suit is pending. Garnishment under fieri facias, being an independent proceeding, must be sued out in the court of the domicile of the garnishee. *Marqueze*, 29 A. 194.

(b) When a court has once acquired jurisdiction over a demand by the plaintiff, from the fact

that it is incidental to the main demand, it retains such jurisdiction, although the main demand has ceased to be an issue in the case. Winter, 6 R. 466.

(c) See note 3 to Art. 90.

Demand for More Than Is Due.

Art. 155. One should only demand in court what is really due to him; nevertheless, if one demand more, the action shall be sustained for the amount actually due, and the defendant shall pay the costs, unless he prove that, previous to the suit, he made a real offer of the amount actually due to the plaintiff, with the interest and the costs which had accrued.

(1) When plaintiff obtains partial relief he should have judgment for costs. Howcott, 133 La. 696.

(2) For *Real Tender*, see C. P. 404 et seq.

(3) Where one sues out an attachment for more than the evidence shows is really due, the attachment will be maintained for the amount actually due. Williams, 105 La. 99, 100.

(4) The only penalty for claiming more than is due is the reduction of the demand to what is actually due. Therefore, the suit should not be dismissed, but judgment given for the amount actually due, if it can be proved under the pleadings. Pharr, 104 La. 700, 702.

Demand for Less Than Is Due.

Art. 156. If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus.

(1) There could be no reason for designedly de-

manding less than is due, except to bring the demand within the jurisdiction of a court of jurisdiction limited as to amount. See second paragraph of Art. 91 and note.

(2) *Scope and Meaning of This Article.* This article does not mean that a party must join all his causes of action against the opposite party in the same suit. He may do so (Arts. 148, 151), but is not compelled to do so. It only forbids the dividing of one debt or one cause of action for several suits. Dimmick's, 111 La. 655, 658, 35 Sou. 801.

Therefore, Stafford, 25 A. 223, is very doubtful authority on the question here presented. 111 La. 659. The decision in the Stafford case, however, was eminently correct on other grounds.

And when a party has taken judgment on mortgage notes, and given receipt in full satisfaction thereof in principal, interest and costs, he cannot afterwards succeed in an action for the attorney's fees expended in collecting the said mortgage. McCaleb, 14 A. 316; 111 La. 659. This is on the ground that accessories cannot be separated from the principal debt, any more than the principal debt can be divided.

And where a party pleads extinction of a judgment by payments, all payments pleaded and proved will be credited on the judgment, but the right will not be reserved to prove other payments in future proceedings. Payne, 35 A. 979. A judgment cannot be attacked piecemeal, and litigation must have an end. 111 La. 660.

In Brandagee, 2 R. 207, it is held that where rent is payable in fixed monthly installments, there may be as many suits for the rent as there are installments due. But it does seem to this writer, with all due respect, that this ruling is erroneous. The law abhors a multiplicity of actions, and here the different installments are due under the same contract. The different amounts are so closely related that all can be proved with as little

trouble as one, and why permit the defendant to be vexed with several different suits, and the costs thereof, when one would suffice. Certainly the plaintiff can sue on one installment as soon as it becomes due without affecting his right to sue on other installments as they mature; but he should be required to sue for all past-due installments, in one suit, under the penalty provided by this article. Interstate, 135 La. 472. Art. 2065 (2060) of the Civil Code should yield to this article in this respect.

In Gaiennie, 130 La. 447, 58 Sou. 143, plaintiff, under the same contract, did certain plumbing work at a fixed price of \$66.50, and laid sewer pipes at a price per foot, amounting to \$48, for defendant. On the same day he filed in the city court two suits against defendant, one for the price of the plumbing and the other for the price of laying the pipes. The Court of Appeal, Parish of Orleans, decided that neither this article nor Article 91 had any application to a case of the kind. The Supreme Court refused to pass on the question because the evidence taken in the case was not before it. Whether or not the Court of Appeal was right in this instance, it is evident that some limit should be put to the division of claims of this nature; otherwise, the creditor of a long store account extending over a long period, could divide it into as many different claims as he sees fit, and could even bring a separate suit on each item. Certainly the law does not contemplate this.

In Acadia Co., 120 La. 1081, where defendant in attachment asked in reconvention for \$100 damages, alleging that he was entitled to greater damages, and reserving the right to claim them in a court of competent jurisdiction, it was held that such demand was no bar to another demand for damages arising from the attachment.

But in Vascocu, 14 La. 135, 141, it is held that a defendant who calls his vendor in warranty must embrace

in his demand in warranty his whole claim for damages arising from the eviction, and cannot afterwards sue for further damages. In this case, however, the question was perhaps "*res adjudicata*." The question involved in this article and *res adjudicata* frequently run into each other, as shown in this case and the preceding.

(3) *Limit of Recovery in Same Suit.* It is generally stated that plaintiff can obtain no greater award or relief than is prayed for in his petition. New England, 121 La. 1069, 47 Sou. 27; Trimble, 35 A. 874; Payne, 35 A. 979; State vs. Burke, 34 A. 404; La. Bank, 35 A. 199, and cases cited.

And a demand cannot be increased without amending the pleadings. This applies to an administrator's account. Hollingsworth, 45 A. 134, 141.

And plaintiff is bound by his allegations of value. Although a value greater than that alleged be proved, he loses the overplus, even though the whole be less than the amount sued for. Thus, where plaintiff sues for the value of 162 logs at \$4.50 per M., and proves the loss of only 125 logs, but worth \$6.38 per M., he can recover only for 125 logs at \$4.50 per M. The overplus is lost to him under this article. Carre, 113 La. 608, 610. It scarcely needs to be added that he could not succeed in another suit for the overplus. It is lost, and the matter, *res adjudicata*.

But amendment is always permissible before issue joined; and even after issue joined in proper cases. See Art. 419. And the Supreme Court, on remanding a case, will, where proper, direct that plaintiff be allowed to amend. Wofford, 10 A. 637; Melancon's, 16 La. 151, 155.

See notes (t), (z) and (aa) to Art. 172.

Interest, Failure to Demand It.

Art. 157. If, in an action of debt, the plaintiff fail to claim the interest due to him, or to amend his petition, in order to include it, he can not, after judgment, demand such interest by another action; he shall be considered as having remitted it. (To be concluded.)

C. P. 553, 522.

(1) This paragraph merely states a branch of the rule laid down in the preceding article for failing to demand interest is failing to demand all that is due.

Interest will not be allowed unless prayed for in the petition. McIntyre, 20 A. 217; Babin, 6 A. 297; Brown, 30 A. 734, 736; Town of Vinton, 181 La. 674, 680. And cannot be recovered in a subsequent suit. Faurie, 2 M. 83; Mann, 4 A. 28; Anderson, 12 A. 95.

Where plaintiff claimed legal interest without alleging a date, it was held that interest could be allowed under the prayer 'for general relief. Vincent, 47 A. 1238, 1243.

Where interest was claimed in the reconventional demand, but not expressly prayed for in the prayer, it was held that the interest was claimed; that the prayer, in view of the allegations of the petition, included interest. Sentell, 49 A. 1021, 1028.

Where the petition claimed interest at only five per cent., but referred to the note annexed to it, which bore interest at ten per cent., it was held that, under the prayer for general relief, the note prevailed over the error, and ten per cent. was allowed. Leverich, 1 R. 469.

We wish that we could close this note with the mention of the foregoing decisions which are in accord with this article. But there are at least two discordant notes.

In Daquin, 8 N. S. 608, 622, it was held that when the interest is a legal consequence of the debt (by which we

understand legal interest) it will be allowed in the judgment, whether claimed or not.

And the same is held in *Duke*, 17 La. 328.

These two decisions referred to and construed Art. 553, C. P., but did not refer to this article. We do not find that these decisions have been upheld in the later decisions, *supra*, and we do not believe them to be correct law.

In *Schwartz*, 30 A. 1002, a suit for materials furnished, there was no prayer for interest, and the Court said that substantial justice would be done by allowing it from judicial demand, under the prayer for general relief. If the interest was claimed in the petition, this might hold under the doctrine of the *Sentell* case, *supra*. If it was not so claimed, it was clearly wrong to allow it.

On whole subject, see *Ann. Cas.* 1912 A. 1228.

(2) *In Suits for Damages for Tort* interest can be allowed only from the date of the judgment. *Latta*, 131 La. 274, 286; *Salmen*, 132 La. 357, 366; *Eichorn*, 112 La. 249; *Bommarius*, 123 La. 615, 617; *Ortolano*, 109 La. 902, 912, and cases cited. Or, where the trial is by jury, from the date of the verdict. *Goothye*, 111 La. 771; *Cochran*, 211 Mass. 171, 97 N. E. 1100, *Ann. Cas.* 1913 B. 206, and note.

It does not appear in these cases whether or not interest was asked for, and we are not prepared to say whether or not such actions could be considered actions of debt and governed by this paragraph. At any rate, it would be safe pleading to ask for legal interest from date of judgment or from date of verdict, as the case may be.

Not Necessary to Demand Costs of Suit. Art. 157 (Concluded).

But, as relates to the costs of the suit, it is not required that they should have been claimed in the petition

or answer, in order to recover them; they are due to him in favor of whom the judgment has been rendered, even if nothing is said on the subject in the judgment.

C. P. 549, 550, 551, 552, 472.

(3) Costs are merely incidental to the judgment. Therefore:

(a) The plaintiff who fails must pay them all. St. Romain, 12 R. 195; Orleans Co., 17 La. 269.

(b) The defendant cast for any amount must pay all, however small a balance is found in plaintiff's favor. Borah, 121 La. 734, 756; McCarthy, 26 A. 382; La. Molasses Co., 52 A. 2070, 2082; Howcott, 133 La. 696; Bayly, 23 A. 423; New Orleans R. Co., 48 A. 1102. Even in contested election cases. Deal, 124 La. 999.

(c) The appellant cast on appeal must pay the costs of appeal. State vs. Miller, 109 La. 241, 33 Sou. 211. Even though nothing is said of costs in the judgment on appeal. Elms, 106 La. 31.

(d) And when the slightest change in the judgment is made on appeal in appellant's favor, the appellee must pay the costs of appeal. Holzap, 38 A. 185, 191; New Orleans, 48 A. 1102; Kernan, 119 La. 247; Derigny, 133 La. 1031.

(e) Costs are not left to the discretion of the Court. The law places them. Bartels, 48 A. 786. There can be no judgment for them apart from a judgment on another demand. Bolton, 10 M. 115; Nugent, 2 M. 307, 313. A Court which cannot determine a cause has no power or jurisdiction over the costs therein. They fall where the law places them, as a mere accessory or incident to the decision

on the question at issue. Begbie, 49 L. R. A. 141, 128 Cal. 154, 60 Pac. 667; Lambert, 115 La. 470.

See, also, 'Mechanics', 9 R. 17; Deal, 124 La. 996.

See, also, note 5, *infra*.

(f) A witness summoned by defendant cannot sue the plaintiff, who was cast for costs, for his pay. The judgment for costs was in favor of defendant, not the witness, and the mode of collection is *feri facias*. Smith, 10 A. 582. Nor can the Sheriff, otherwise than from the plaintiff who owns the judgment, collect his costs. Kershaw, 9 R. 77.

(g) Costs of lower court are not included in fixing the amount of the bond for suspensive appeal, under C. P. 575. Brown, 9 A. 310; Jorda, 29 A. 778; Paland, 42 A. 290, 7 Sou. 899.

(h) Costs cannot be sued for in a separate suit. They must be taxed in original suit. Casey, 118 La. 581.

(4) Costs follow and are included in judgment, whether mentioned or not. State vs. Rost, 48 A. 459; Elms, 106 La. 31; Derigny, 133 La. 1031, 63 Sou. 507.

(5) *Costs Solidary*. Where two or more defendants are sued jointly, or upon same cause of action, and are cast, they will be condemned for costs in *solido*. R. C. C. 2087; Lamotte, 52 A. 864, 868; Kittredge, 92 U. S. 221. And also when two or more join as plaintiffs and are cast. Dunbar, 11 A. 713.

(6) *In Reconventional Demands* the above rules as to costs apply. C. P. 550; Peniston, 15 A. 679, 681; New Orleans, 11 A. 214; Hunter, 113 La. 833, 838. At first sight, the Hunter case here cited may appear to be in conflict with the Peniston case here cited, because in the Hunter case, at p. 838, it is remarked that where both parties are cast the rule should be just the reverse of

that laid down in the Peniston case. Both parties were cast in each case, but in the Peniston case each was cast on his own demand; while in the Hunter case each was cast on the demand of his adversary.

In one case, where there was a reconventional demand and each party succeeded in getting judgment on his demand, it was held that the costs should be paid by the one who recovered the smallest judgment. Bloch, 46 A. 1334, 1345. This seems contrary to the law. See Cook, 126 La. 413, 52 Sou. 560; Gilly, 122 La. 967, 48 Sou. 422.

Jurisdiction as to Costs.

(7) As said in note (1), (e), *infra*, costs follow and are included in the judgment, and no other Court than the one which rendered the judgment has jurisdiction over the question. But it sometimes becomes necessary to tax the costs or fix the amount thereof. The jurisdiction to do this belongs incidentally to the court in which the proceedings had taken place; "primarily, the inferior, and by appeal the appellate, court." State vs. Judges, 107 La. 69, 71; Whitney, 40 A. 112, 121; State vs. Lazarus, 40 A. 856, 5 Sou. 289. And such costs should be taxed by rule in the same suit. Learned, 42 A. 456, 464, 467; Casey, 113 La. 581, 37 Sou. 484.

And no appeal will lie from decree taxing costs where no appeal has been taken from the judgment on the main demand to the Supreme Court when the amount of costs in dispute is below the jurisdiction of the Supreme Court. Freie, 107 La. 79; Robson, 119 La. 387, 44 Sou. 136.

From the cases cited in this note construed with the cases cited in note (1), (e), *infra*, we conclude that from the necessary judgment, not left to the discretion of the Court, throwing the costs on the party cast, there can be no appeal separately from the main judgment. But from the judgment on a rule to tax costs, where the

Court exercises discretion, and is not bound as to amount strictly by statute, an appeal lies to the court having jurisdiction of the amount.

(8) The foregoing notes have been written without regard to Sec. 2 of Act 229 of 1910, p. 388, which provides as follows:

“That all appellate courts of this State shall have power to tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be deemed equitable.”

This statute repeals the effect of the paragraph under discussion, so far as appellate courts are concerned, but does not disturb the rule as relates to trial courts.

The Supreme Court has thus far seldom exercised the discretion vested in it by this statute—only twice that we have been able to find—to wit, in *Brown*, 133 La. 726, 728; and in *Williams*, 128 La. 811, 55 Sou. 414.

It is purely discretionary with the appellate court to exercise the power vested in it by this statute; and the Supreme Court has in most cases since this statute was passed simply followed the old law, or allowed it to take effect, as it does if the power given by the act of 1910 is not exercised. *Derigny*, 133 La. 1032, 63 Sou. 507.

Demand Can Not Be Premature.

Art. 158. When the demand is premature, that is to say, when the action has been brought before the debt has become due, the suit must be dismissed, leaving to the party his right to bring his action in due time.

The same rule must be observed if the object due be demanded out of the place where it was to have been delivered, or if the obligation be conditional, and its execution be demanded before the condition has been fulfilled.

C. P. 14; R. C. C. 2052.

See note to Art. 14.

(1) Suit cannot be brought to enforce a conditional obligation until the condition has been fulfilled. Plaintiff will be nonsuited. Thompson, 20 A. 535; Gronig, 13 L. 402; Forbes, 15 A. 707, 708.

(2) *Suit by an accommodation acceptor* is premature before the maturity of the bill and payment by him. Shannon, 9 A. 526. Or by any acceptor. First Bank, 41 A. 231; Reed, 2 A. 498; Price, 13 A. 526; Todd, 14 A. 426.

(3) *Suit on a note against an endorser* is premature before the maturity of the note. Harrod, 5 R. 449; Bank, 49 A. 934, 948. And against the drawer of a bill of exchange. Denegre, 10 A. 324; Chafin. 44 A. 518, 10 Sou. 862.

(4) Although *attachment* is allowed on a debt not yet due, it must be upon a debt actually existing, though not due. It cannot be allowed upon a conditional or contingent liability. Sondheimer, 121 La. 787, and cases cited on p. 795.

(5) Suit on a *Contractor's Bond* is premature until after settlement of accounts between owner and contractor. Lhote, 115 La. 669, 674.

(6) A suit to *annul a sale of real estate and recover the purchase price*, on the ground that there is a superior outstanding title in a third person, is NOT premature, although the plaintiff is in possession and has not been disturbed or evicted. Bonvillain, 117 La. 794, 807 et seq., overruling Bonnabel, 3 A. 699. See cases cited in the opinion on rehearing, and also in the first opinion, which was reversed on rehearing. See, also, Bayley, 26 A. 257.

(7) A suit for *damages for wrongful injunction* is premature until it is shown that the injunction has been

dissolved by final judgment. Thomas, 120 La. 505, 45 Sou. 406.

(8) A suit for divorce based on separation is premature if brought within one year from finality of judgment of appellate court. Hill, 114 La. 117.

(9) A suit by a minor to be recognized as owner of real estate purchased by his tutor in his official capacity is not premature from the fact that the succession of the minor's mother has not been finally settled. Rist, 44 A. 378, 10 Sou. 760.

(10) A suit against a notary for failing to record an act of mortgage is premature until it is shown that damages have actually resulted from the failure to record. Dwyer, 40 A. 46, 3 Sou. 360.

(11) A suit by taxpayers to prevent the holding of an election to decide whether or not a tax shall be levied is premature; the danger is too remote. Roudanez, 29 A. 271. So with a suit to enjoin the execution of a judgment on which no writ has issued. State vs. Judge, 34 A. 89. And so with a suit to enjoin the adoption of a municipal ordinance. New Orleans, 39 A. 127, 1 Sou. 434; Harrison, 33 A. 222.

(12) *Prematurity Must Be Pleaded in Limine.* It has been universally held that the exception of prematurity is dilatory and must be pleaded in limine; that is to say, before default taken or answer filed. C. P. 333. If this is not done, the defendant cannot raise the question afterwards. Howard, 1 La. 419, 420; Millaudon, 8 La. 588; Benedict, 4 R. 392; Pecquet, 17 A. 204, 232; Wiltz, 18 A. 187; Mortee, 20 A. 237; Penniston, 18 A. 158; Meaux 35 A. 360; Raymond, 112 La. 869, 36 Sou. 787; Bijou, 118 La. 956, 43 Sou. 632; Levert, 127 La. 1005; Landwirth, 47 A. 337. But the exception is not waived when referred to the merits by consent, particu-

larly where the answer is filed with reservation of the exception. Murray, 46 A. 452, 15 Sou. 25.

But where the issue presented pertains to the merits, defendant waives no rights by not filing exception of prematurity in limine. American, 115 La. 189, 38 Sou. 960. This distinction should be carefully noted. Where there is an actually existing debt, although the day of payment has not arrived, and suit is brought upon it, unless prematurity is pleaded in limine, it will not avail. But where the debt is dependent upon a condition, and the condition has not happened, it is clear that there is no present debt. There may never be a debt because the condition may never be fulfilled. This condition belongs to the merits, and need not be pleaded in limine. Upon a debt of the first class, if the proper requisites obtain, attachment may issue under Art. 244. But upon the conditional obligation proper attachment cannot issue before the condition happens. See notes 1, 2, 3 and 4, *infra*, and cases cited therein. And see note to Art. 14.

(13) Of course, if suit is brought upon a debt, part of which is due and part not due at the time the suit is brought, judgment may be rendered for as much as is due, and nonsuit entered for the remainder. Christen, 24 A. 50; Egan, 46 A. 481. And where the exception is not pleaded in limine, judgment may be given for all that falls due before answer filed. Millaudon, 8 La. 588, 589.

(14) The question of prematurity should be determined as of the date of the institution of the suit. Central, 119 La. 264, 44 Sou. 10. In the case of a remedial writ, as of the time the rule nisi issues. McClelland, 122 La. 241, 47 Sou. 540. The time when a suit may be tried has nothing to do with the question of prematurity. Central case, *infra*.

Art. 159. Judicial demands are either *verbal* or *in writing*.

It is only before justices of the peace that demands may be made verbally, as will be provided in the rules to be observed for proceedings before the tribunals of justices of the peace.

All other demands brought before courts must be in writing and in the form of a petition.

Suits before Justices of the Peace. C. P. 1073 et seq.

Petition and its requisites. C. P. 170 to 175, inclusive, and the notes thereto.

No Distinct Forms.

Art. 160. Though there may be as many kinds of demands as there are actions, those which must be made in writing are subject to no distinct and peculiar form; they are only subjected to a few general and common rules hereafter provided.

C. P. 172 to 175, inclusive, and notes; 161.

Only Clearness Required, With Proper Prayer.

Art. 161. It is sufficient in all judicial demands which are required to be in writing, to express clearly what is demanded, with such conclusions as may serve for a basis to the judgment to be rendered in the cause.

C. P. 172, Nos. 4 and 6; 173.

(1) *Vagueness* is a general term applied to want of clearness, want of precision, generality of averment, insufficiency of detail, failure to allege circumstances of time and place, etc., in pleading.

Pleadings must set out what is to be proved, and must be sufficiently full and explicit to notify the adverse party

of the specific facts to be proved, so that he may be prepared to rebut. Another object to be attained is to fix with certainty the matter to be adjudicated, so that the judgment will constitute a bar to another suit for the same cause of action. Doullut, 37 A. 800, and cases cited on p. 802, under No. 11; Albinest, 107 La. 138; Fox, 118 La. 342, 42 Sou. 958; Lombard, 107 La. 183; Esteves, 121 La. 991; Goldsmith, 122 La. 835.

Therefore, defendant may require plaintiff to declare whether he is suing on a written or a verbal contract. Lombard, 107 La. 183, 184, 185. But a mere plea of "vagueness," without calling upon plaintiff to so declare, will not be sustained, since it does not point out in what the vagueness consists. Bruce, 123 La. 969, 977; Brown, 19 A. 438.

One attacking a judgment as having been obtained by fraud and ill practices must specifically allege the acts constituting the fraud and ill practices. Moss, 130 La. 285, 287.

A defendant sued for work, labor and materials furnished will be sustained in refusing to answer until a statement of the items and particulars constituting the amount is furnished. Hyland, 20 A. 65. And an account sued upon is not sufficient when one of the items is stated to be a balance brought over from a former account. The whole account must be itemized. Ledoux, 2 A. 395; Executors, 7 A. 535.

In a suit for damages for negligence all that is required is that defendant be sufficiently apprised of the cause of action against him, and a bill of minute particulars need not be furnished. Whitworth, 121 La. 894, 897. Especially where the case is in the Supreme Court, and all the facts show that defendant has not been injured by the overruling of his exception. Whitworth, 121 La. 898. And especially is this true when the knowledge of the details and causes of the accident are more

within the knowledge of the defendant than of the plaintiff. *Lykiardopoulo*, 127 La. 309, 53 Sou. 575. See *Williams*, 52 A. 1441.

And in a suit for damages, provided it is stated how the damages have been suffered, or for what they are recoverable, they may be demanded in a lump sum, without assessing a stated amount to each element of damage. *Bickham*, 50 A. 765, 767, and cases cited; *Solomon*, 50 A. 1294, 1297; *Williams*, 52 A. 1442.

In a suit for separation from bed and board, general allegation of ill treatment will not suffice. There must be allegations of the facts constituting the ill treatment. *Ogden*, 49 A. 1716. In suit for divorce. *Gastauer*, 132 La. 942.

In a suit to establish the existence of a will claimed to have been suppressed by defendants, plaintiffs are not required to allege specifically form, date and other particulars concerning the will, especially where it appears that they expect to prove these facts by the testimony of defendants. *Sprowl's*, 109 La. 352, 358. See *State*, 35 A. 1168.

(2) The *Exception of Vagueness* is a *dilatory* exception, and must be pleaded in limine. If sustained, the suit is not dismissed, but plaintiff is permitted to amend. *Maissonneuve*, 130 La. 715; *Goldsmith*, 122 La. 831, 48 Sou. 279; *Doullut*, 37 A. 800.

Defendant may, however, on the trial object to proof of what has not been alleged in the petition. But where the allegations are sufficient to notify him what evidence will be offered, he cannot object to the evidence on the ground of want of explicit and detailed allegation. His remedy was exception filed in limine. *Doullut*, 37 A. 800; *Albinest*, 107 La. 138. He cannot in such a case claim that he is taken by surprise by the evidence offered. *Fox*, 118 La. 342; *Western*, 41 A. 385.

And even though defendant has excepted in limine to

the want of particular averment, and been overruled, if he does not renew the exception, or plead surprise, or object under the reservation of his exception, when the evidence is offered on the trial of the case, he thereby waives his exception previously taken. *Lykiardopoulo*, 127 La. 309, 314.

(3) *No Cause of Action Shown.* A petition may be clear in its statement of facts, minute and explicit as to details and particulars, and at the same time show no cause or right of action under the law. It is clear, therefore, that the grounds for an *Exception of No Cause or Right of Action* are grounds clear and distinct from the grounds for an *Exception of Vagueness*. *Goldsmith*, 122 La. 831, 48 Sou. 279.

To be safe from dismissal on exception of no cause of action, a petition should allege every fact necessary to recovery. For example, in a petition for damages for injury sustained upon the property of defendant through alleged negligence of defendant, it is essential that plaintiff allege by what authority he was upon said property. *Lynch*, 127 La. 848, 54 Sou. 123; *Morris*, 132 La. 306, 61 Sou. 383; *Hart*, 34 A. 323; *Hicks*, 5 M. 691.

And in an action for injury received it is not sufficient to allege the facts and conditions from which injury might have resulted, but the causal connection between the facts and the injury must be stated. *Gahagan*, 119 La. 25, 43 Sou. 900.

And in a suit against the endorser of a note it is necessary that plaintiff allege due notice of dishonor given the endorser. Allegation that the note was protested is not sufficient. *Wisdom*, 120 La. 700, 45 Sou. 554.

And where a putting in default is necessary under the law, a petition which fails to allege that the defendant is in default, and how, shows no cause of action. *Godchaux*, 126 La. 187, 52 Sou. 269.

A petition may also show no cause of action from the fact that a certain allegation or allegations contained therein destroy the legal effect of the remaining allegations; as where a petition for damages for negligence, while showing defendant's negligence contributing to the injury, shows also the contributory negligence of the plaintiff, or some other fact barring his recovery. *Ingersol*, 134 La. 19, 63 Sou. 609; *Levy*, 115 La. 204; *Friedrichs*, 114 La. 95; *Levy*, 32 A. 1029.

A petition may also show no cause of action from the fact that it shows on its face that plaintiff's demands cannot be sustained by legal proof; as where a petition sets up merely a parol title to real estate. *Cambre's*, 134 La. 94, 63 Sou. 680.

(4) *The Exception of No Cause of Action* is what in common-law pleading is termed a demurrer. No evidence is taken upon the trial thereof. It is tried solely upon the allegations of the petition. *State vs. Mayor*, 130 La. 196, 57 Sou. 798. And the question to be determined is whether or not the petition sets forth on its face a right to judgment. *Kird*, 105 La. 226. And the exception should not be sustained when a judgment for anything could be legally rendered on any of the allegations supported by evidence. *Davis*, 117 La. 320, 41 Sou. 587. Nor where the sufficiency of allegation is doubtful, and under certain phases a cause of action might appear. *Hillard*, 114 La. 884, 38 Sou. 594. All the allegations, however, are to be considered together, and with reference to the prayer. *Howcott*, 106 La. 530; *Maissonneuve*, 130 La. 714.

This exception admits, for the purposes of the trial of the exception, the truth of the averments of the petition. *Kird*, 105 La. 226. That is to say, all the well-pleaded allegations of fact. *Watkins*, 107 La. 107; *Goldsmith*, 122 La. 831, 48 Sou. 279. Facts alleged are admitted, but not conclusions drawn from them. *Trahan*, 125 La.

785, 51 Sou. 898; Malbrough, 128 La. 40, 54 Sou. 468. Thus, the allegation that a mortgage note is prior in rank to another mortgage note is merely a conclusion of law. It does not state the fact which causes it to outrank the other note—viz., prior registry. Not having alleged prior registry, the pleader would not, on objection made, be allowed to prove it. Levy, 133 La. 126, 131. See, also, Arent, 133 La. 134, 62 Sou. 602. And an allegation that defendant is a holder in bad faith is not an allegation of fact, but a mere conclusion of law. State vs. Hackley, 124 La. 855, 863. Nor will allegations that are purely inferential or argumentative be considered in determining this exception. McCloskey, 128 La. 198, 54 Sou. 738.

Nor will allegations too general and indefinite be considered, as the allegation that "the will is absolutely void for other legal defects, fatal to its maintenance, which will be pointed out on the trial of this suit." Oglesby, 124 La. 1091. See, also, Coguenheim, 130 La. 323, 324, 57 Sou. 989.

In fact, the grounds for the exception of no cause of action and the grounds for the exception of vagueness sometimes run very close to each other; as where a petition is so vague and indefinite that it is impossible to determine its meaning. Davie, 128 La. 159, 163. The distinction is that, when the allegations are too vague and indefinite to admit of proof, the exception of no cause of action lies; if not, the defendant must content himself with demanding greater fullness of averment in limine, by the exception of vagueness. Note 2, *infra*. The point at which the allegations become too vague and indefinite to admit of proof is variable, and cannot be established by any rule which could be applied to all cases. Sprowl's, 109 La. 352, 33 Sou. 365. See State vs. Hackley, 124 La. 865, 866, and instances there cited.

(5) The exception of no cause of action, being a per-

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empty exception, may be filed at any stage of the suit. Fletcher, 21 A. 150; Tarleton, 21 A. 500. And the maintaining of the exception dismisses the suit. Goldsmith, 122 La. 831, 48 Sou. 279. "Unless a cause of action is alleged, there is no suit, and, hence, nothing to amend." State vs. Hackley, 124 La. 855, 869; Hart, 34 A. 323; Raymond, 35 A. 276.

But, of course, the judgment of dismissal is no bar to plaintiff's renewing his suit on proper allegations. Godchaux, 126 La. 187, 52 Sou. 269; Hicks, 114 La. 219.

And where no exception of no cause of action is filed, defendant contenting himself with objection on the trial to proof of necessary facts which should have been alleged, plaintiff will be nonsuited. Wisdom, 120 La. 700, 710, 711.

Prayer of Petition.

(6) By "conclusions" we understand the prayer of the petition, which must ask for such judgment as the allegations of the petition, if proved, would warrant plaintiff in recovering, under the law. See Art. 172, No. 6, to which we will defer more extended discussion of the prayer of the petition.

SECTION 2.

Before What Tribunals Actions Are to Be Brought.

General Rule, Suit at Domicile of Defendant.

Art. 162. It is a general rule in civil matters that one must be sued before his own judge, that is to say, before the judge having jurisdiction over the place where he has his domicile or residence, and shall not be permitted to elect any other domicile or residence for the

purpose of being sued, but this rule is subject to those exceptions expressly provided for by law.

C. P. 76; 86, 87, 3; 89; 90; 93; 125; 129; 154.

(1) This article is rigidly enforced. No exception is allowed except one expressly provided by law. *West*, 115 La. 219 et seq.; *Footte*, 115 La. 37; *Hardy*, 104 La. 136, 139; *Sorrel*, 26 A. 554; *Dejona*, 17 A. 277, 280; *State vs. Judge*, 21 A. 258; *Rochereau*, 24 A. 311; *Richardson*, 23 A. 255; *Boner*, 6 R. 6; *Bailey*, 120 La. 893.

(2) As to what constitutes *Domicile* or *Residence*, see R. C. C. 38 to 46, inclusive; C. P. 166, 167, 168; *Tanner*, 11 La. 175, 178, 179; *Sanderson*, 20 A. 312, 314; *Steers*, 47 A. 1553, 1557.

The residence of a corporation is, of course, its domicile. *Police Jury*, 122 La. 391.

(3) An *Officer*, when sued officially, must be sued at his official domicile. Note (1) to Art. 129; *State vs. Foster*, 111 La. 1091; *State vs. Fournet*, 30 A. 1103. A State board must be sued at the domicile which it has fixed for itself under the law. *State vs. Board*, 105 La. 535.

The *Police Jury*, being domiciled in the whole parish, may be sued before any Justice of the Peace in the parish for an amount within his jurisdiction. *State vs. Judge*, 41 A. 403, 6 Sou. 653; *State vs. Dupre*, 46 A. 117, 14 Sou. 907. These cases overrule *Berthaud*, 7 R. 550.

But when an officer is sued personally, even where the suit is to contest his right to the office, the suit must be brought at his personal domicile or residence. *State vs. Follett*, 33 A. 228; *State vs. Egan*, 33 A. 910; *Bailey*, 120 La. 893.

(4) *The Domicile of a Wife* is that of her husband, and she must be sued there. R. C. C. 39; *Evans*, 8 N. S. 247; *McKenna*, 23 A. 369; *Sanderson*, 20 A. 312; *Glaude*,

43 A. 161, 163; First Bank, 123 La. 1019, 49 Sou. 692. But where the husband abandons the home, without attempt to have the wife follow him, she may sue him for separation in the court of the home. McLean, 45 A. 664, 12 Sou. 747.

(5) *A Minor's Domicile* is that of his tutor or parents. R. C. C. 39; Stephens, 19 A. 500.

(6) *An Interdict's Domicile* is that of his curator. R. C. C. 39; Vick, 47 A. 43, 16 Sou. 568.

(7) A suit for *Interdiction* must be brought at the actual residence of the proposed interdict, regardless of where his legal or constructive domicile may be. Dumas, 32 A. 679, 682 et seq.

(8) "*Shall not be permitted to elect any other domicile or residence for the purpose of being sued.*" The best interpretation of this clause that we have been able to find is that given in Jex, 18 A. 89. It makes absolutely null and void any agreement waiving domicile made at the time of the contract. The object of the law is the protection of the needy borrower and hard-pressed debtor.

But this clause does not prevent the transfer by consent of a suit from one jurisdiction to another after its institution. Stackhouse, 36 A. 529, 531.

Nor does this clause nullify an acceptance of service, waiver of citation, and confession of judgment, signed two days before suit is filed, when the petition, service of which is accepted, is addressed to a particular court, other than that of defendant's domicile; but the judgment rendered thereon in the court named will be valid. Kelly, 40 A. 498, 4 Sou. 480.

Nor is the effect of Art. 93 in the least curtailed by this clause. See notes to that article.

(9) The *Exceptions* to the general rule laid down in

this article are, in the main, provided in the three succeeding articles. We will add other exceptions in the notes to Art. 165.

Exceptions to the Rule of Domicile: Real Actions, Provisional Seizure, Sequestration.

Art. 163. In action of revindication (sic) of real property, or where proceedings are instituted, in order to obtain the seizure and sale of real property in virtue of an act of hypothecation importing confession of judgment, and in actions brought to enforce a legal or judicial mortgage against a third possessor, and in actions against a third possessor to enforce a special mortgage, and in all cases of provisional seizure or sequestration the defendant may be cited, whether in the first instance or in appeal, either within the jurisdiction where the property revindicated, hypothecated or provisionally seized or sequestered is situated or found, though he has his domicile or residence out of that jurisdiction, or in that where the defendant has his domicile, as the plaintiff chooses; *provided*, that all judgments rendered in such cases shall only be operative up to the value of the property proceeded against, and not binding for any excess over the value of the property *in personam* against the defendant. (As amended by Act 64, 1876, p. 106.)

(1) *Actions of Revendication of Real Property* include:

(a) Petitory action. Maduel, 30 A. 1405; Scott, 3 A. 637; Blanchard, 4 N. S. 188.

(b) Possessory action, and, therefore, slander of title, which is a form of the possessory action. Williams', 117 La. 600, 608.

(c) Action to rescind sale for lesion. Smart, 109 La. 986, 988.

(d) Rescission of lease, and recovery of the premises. Second Municipality, 11 R. 387.

(e) Action in declaration de simulation. Edwards, 20 A. 169.

In fact, we believe that all real actions may be brought where the property is situated. Williams', 117 La. 608.

It is certain that the word "revendication" is given a wider range in interpreting this article than has been given it in interpreting Art. 44, where it undoubtedly means actions in which the title is in issue. See notes to Art. 44. All other cases of real actions are covered by paragraph 8 of Art. 165.

(2) *Suit "to obtain the seizure and sale of real property" under hypothecation importing confession of judgment* may be either in parish where property is situated or at the defendant's domicile; but in the latter case the proceeding must be via ordinaria. Gravier, 4 La. 239; Generes, 21 A. 653; Gantt, 25 A. 507; Fulton, 131 La. 768, 60 Sou. 238; Scott, 15 A. 346; Roman, 17 A. 126.

(3) *Provisional Seizure and Sequestration.* The right to pursue these remedies in the jurisdiction where the property is found seems to have been recognized even before this article was amended to include them. Henning, 5 A. 349, 352; Lalaurie, 8 A. 366; Gails, 14 A. 54; Giffin, 19 A. 204.

And so much more since the amendment of 1876. Carroll, 43 A. 1194, 10 Sou. 187. And it is, in this case, held that it is of no consequence that the property has not been actually seized, the proceeding being quasi in rem. Carroll, 43 A. 1194, 10 Sou. 187.

The amendment of 1876 was made necessary by the decision in Gay, 27 A. 166, which held contrary to the earlier cases.

Property Held in Pledge. Where the plaintiff is in possession of the property proceeded against, as pledgee thereof, it was held before the amendment of 1876 that he must proceed at the domicile of defendant. Thorn, 9 A. 231. The same rule doubtless still prevails, for there is no necessity for sequestration or provisional seizure of such property.

(4) *The proviso at the end of this article* is not expressed as clearly as it should be, but it simply means that when suit is not brought at defendant's domicile the judgment must be limited to the property proceeded against, or its proceeds, and cannot be in personam against the defendant for any amount exceeding such value or proceeds. Carroll, 43 A. 1194, 1196; Giffin, 19 A. 204, 206; Peterson, 17 A. 93, 97; Dejana, 17 A. 280; Lalaurie, 8 A. 367.

This proviso cannot be said to apply strictly in actions of revendication; for a demand for fruits and revenues, or their value, is said to be incidental to the demand in revendication, and follows it. See note (1) (b) to Art. 153, and note (2) (b) to Art. 154.

(5) *The Action of Boundary* is a real action which *must* be brought where the property is situated. R. C. C. 840. And a suit to establish the boundary between two parishes may be brought in either parish. Caddo, 114 La. 366, 38 Sou. 273.

Exceptions Continued: Succession Matters.

Art. 164. In matters relative to successions, the defendants, though domiciliated elsewhere, must be cited to appear before the court of the place where the succession has been opened:

1. In all suits brought by the heirs against each other, until after partition inclusively;

2. In all suits brought by the creditor of the deceased previous to the partition.

3. In all suits relating to the execution of testamentary dispositions until the final settlement of the affairs of the estate has been effected;

4. When the partition of an estate has been or may be made belonging to one or several heirs, who are present or represented therein, all the real and personal actions, or others which are relative to said succession, shall be brought against the said heirs before the court where the said succession is opened.

R. C. C. 1113; R. S. 2662.

(1) Suits against a succession must be brought in the parish where the succession is open. Hereford, 14 A. 333; Mellor, 33 A. 1404. And a suit against an administrator as such is a suit against the succession. Gallier, 1 R. 226. See Williams', 117 La. 608, 609.

But an action in revendication of real estate against a pending succession may be brought where land is situated, though in a different parish. Williams', 117 La. 608, 609.

(2) Suits relative to the will of the testator and rights under it. Denegre, 33 A. 689; Gibson, 32 A. 960.

(3) The court in which the succession is open has jurisdiction to *partition* all the property of the estate, wherever situated in the State; and the whole should be partitioned at once. McGuire, 112 La. 76, 102.

See notes to Art. 165-1.

(4) The Court where the succession is open, having ordered the sale of succession property, has jurisdiction to compel the adjudicatees at said sale to show cause why they should not accept title, or suffer the property to be resold, irrespective of the domicile of such adjudicatees. Lund, 134 La. 410, 415, 420. And has jurisdiction to

enforce any and all remedies against such an adjudicatee. Bobb, 27 A. 344; Lewis, 6 La. 437. Such jurisdiction is incidental to the power to have the property sold. Haggerty, 28 A. 87, 88; Raguet's, 6 N. S. 659; Landry, 4 R. 127.

Of the above cases, the Lund case is the only one in which it is shown that the defendants did not reside within the territorial jurisdiction of the court; but the other cases give the principle upon which the rule is based, and are cited in the Lund case.

(5) A succession open in a court, and unclosed, is said to be a "*Juridical Entity*." West, 115 La. 219; Wilson, 107 La. 139, 142. "*Juridical Person*." LeBlanc, 27 A. 328. "An ideal being; a unity." Blake, 30 A. 390. "An entirety." Boisse, 31 A. 748.

After the succession is closed, if there has been no partition, the heirs are owners in common of the hereditary effects. Freret, 31 A. 506. Of course, if there has been a partition, each owns his share separately. See Levy, 40 A. 506, and cases cited.

A Succession Is Closed:

(a) When the administrator's account has been homologated, and the heirs placed in possession, by judgment, whether all the debts have been paid or not. Freret, 31 A. 506; Caire, 43 A. 1183; Aronstein, 51 A. 1055, 1056.

(b) Where the heirs have unconditionally accepted and been placed in possession by judgment. Woolfolk, 30 A. 139, 144; Mayronne, 30 A. 974; Dunford, 25 A. 56, 57; Hacker, 28 A. 446, 447; Augustin, 29 A. 838; Beauregard, 33 A. 827; Claudel, 28 A. 872; Godwin, 47 A. 853; Dauphin, 112 La. 106.

(c) Where the heirs are permitted to take actual possession and treat the property as their own. This may be done by suing for a partition. Sevier, 29 A.

440; McCall, 28 A. 713. Or by mortgaging the property of the ancestor. Scott, 36 A. 278. The heirs in this case are estopped toward the mortgage creditor and those acquiring under the mortgage. See Ledoux, 52 A. 312, 355.

And it seems that in such a case the succession may be closed as to a particular creditor, who has dealt with the heirs as possessors, while it may remain open as to others. Barton, 114 La. 224, 38 Sou. 150. See Boudreaux, 127 La. 100, 114; as to estoppel, 115.

And we see no reason, under the same reasoning, why a succession cannot be considered closed as to all except a creditor who has preserved his rights against a succession as such. See Frazier, 33 A. 593; Ventress, 34 A. 460; Townsend, 37 A. 408; Robertson, 49 A. 80, 83, 85.

(d) Even when no proceedings have ever been taken in court, where the heirs have taken possession and treated and dealt with the property as their own. Bransford, 46 A. 1218; Johnson, 25 A. 144. What effect inheritance tax law, Act 109, 1906, Sec. 3? See Pavey, 124 La. 525.

A succession, once fully closed, *cannot be reopened*. Aronstein, 51 A. 1052, 1056. Unless the judgment closing the succession is attacked and set aside. Dauphin, 113 La. 209, 212, 214; Beauregard, 33 A. 827; Hacker, 28 A. 446; Atkinson, 35 A. 313.

After the succession is closed in any legal way, suit must be brought against the heirs who have accepted, and not against the (former) succession representative. Brashear, 29 A. 349; Sevier, 29 A. 440, 442; Augustin, 29 A. 837; Beauregard, 33 A. 827, 830; Hacker, 28 A. 446; Claudel, 28 A. 872; Atkinson, 35 A. 313; Caire, 43 A. 1133, 10 Sou. 203; Dunford, 25 A. 56.

But as long as the succession is under administration

for the purpose of paying debts and legacies, if there be any, the heirs cannot take possession without tendering the amount necessary to pay same and the charges of the succession. Dreyfus, 33 A. 605, and cases there cited. Therefore, if the heir, under such circumstances, has granted a mortgage on the succession property, execution of such mortgage may be enjoined. Dreyfus, 33 A. 602. The surviving widow in community may sell her interest in the succession, but subject to the debts and charges, and such sale cannot divest the possession of the administrator. Webre, 42 A. 178, 7 Sou. 460; Thompson, 110 La. 26, 39, and cases cited on p. 33.

While the succession is under administration, creditors look to the administrator alone. Therefore, creditors may oppose a partition or a closing of the succession before the debts are paid. Clark, 30 A. 805. This is put on the ground that it would not be convenient for the creditor to have to pursue each of the heirs for his virile share.

Exceptions to Rule of Domicile—Continued.

Art. 165. There are other exceptions to this rule which require that the defendant be sued before the judge having jurisdiction over the place of domicile or residence; they are here enumerated:

In Partition of Real Property.

One: In matters relative to the partition of real property between several coproprietors, for in such a case the suit must be brought before the court of the place where such property is situated, though the coproprietors may reside in different parishes.

(1) Art. 1022, C. P., and Art. 1187, R. C. C., apply where the succession is still open. This article and Art.

1290, R. C. C., apply where the succession has been closed and in all other cases of joint ownership. Baily, 30 A. 1035, 1036; Maguire, 112 La. 76, 100 et seq.; Brinkman, 42 A. 114.

(2) Where a succession is joint owner with other person or persons, this paragraph applies. Baily, 30 A. 1032.

And in all cases except where the property of an open succession is to be partitioned among the heirs. Benedict, 30 A. 1337, 1339; Anderson, 12 A. 669; Crawford, 46 A. 1261, 1264.

(3) Where the real estate is a continuous tract of land situated partly in different parishes, the suit may be brought in any one of such parishes. R. C. C. 1291.

Partnership.

Art. 165 (Continued).

Two: In matters relative to partnership, as long as the partnership continues, in all suits concerning it the parties must be cited to appear before the tribunal of the place where it is established, or if there are several establishments, before that of the place where the obligation was entered into.

(1) Partnership and partners are suable together for a partnership debt in the parish where the firm conducts its business. Hobson, 13 La. 422. But only during the existence of the partnership. Marsh, 9 R. 45; Police Jury, 122 La. 391; Weil, 126 La. 533; Williamson, 133 La. 310.

(2) But after the dissolution of the partnership each of the former partners must be sued at his own domicile. Black, 17 La. 85; Marsh, 9 R. 45. See Ranlett, 30 A. 60; Montague, 30 A. 55; Goodrich, 31 A. 584, 585.

But one partner can sue the others, after dissolution of the partnership, at its former domicile, for liquidation

and settlement of the partnership. Lobdell, 24 A. 296, 297. But see review of this case in Ranlett, 30 A. 58.

(3) See note 4 to paragraph 6, *infra*.

Insolvency.

Art. 165 (Continued).

Three: In all matters relative to failure all the suits already commenced, or which may be subsequently instituted against the debtor, must be carried before the court in which the failure has been declared.

(1) *Insolvency Proceedings* are at the present time carried on almost entirely in the United States courts under the national bankruptcy law. We will, however, endeavor to summarize the decisions of our Court on the subject of this paragraph.

(2) Proceedings in another court than that in which the insolvency has been declared, by a party to the *concurso*, are null and void. Menard, 3 N. S. 375.

Proceedings against property surrendered by an insolvent must be brought in the court where insolvency is pending, and tried contradictorily with the creditors. Clossman, 2 R. 346. The relative rank of all creditors must be determined on a *tableau* of distribution. Marsh, 9 R. 45; Corney, 8 A. 371; Fabre, 14 A. 648; Tenny, 14 A. 221.

And the same is true as to all the property of the insolvent, whether surrendered or not. Nimick, 17 A. 85; Spears, 40 A. 651. See Chaperton, 44 A. 352; Phillipi, 44 A. 675; State vs. Theard, 50 A. 621; Receiver, 52 A. 1617.

(3) But suits commenced against the debtor before the declaration of the failure do not abate. They are continued after the failure against the *syndic*. State vs. Ellis, 41 A. 41. And are transferred to the Court where

insolvency is pending. *State vs. Judge*, 42 A. 73; *Calder*, 44 A. 461; R. S., Sec. 1618. And a suit thus commenced need not be cumulated with the insolvency proceedings, but is tried primarily against the syndic alone. But the judgment obtained against the syndic can only be ranked and paid, *en concurso*, contradictorily with the other creditors. *State vs. Ellis*, 41 A. 41; *Chaperton*, 41 A. 353.

(4) This paragraph refers only to failure or insolvency which has been *declared judicially*. *Board of Missions*, 130 La. 1079.

(5) *Corporations, Banks, etc.* This paragraph applies to suits against corporations in the hands of receivers when the reason for the receivership is the insolvency of the corporation. It also perhaps applies to suits against corporations in the hands of receivers when such corporations are unable to meet their obligations and the receivership takes the form of a liquidation or winding up of the affairs of the corporation. It has been said that it applies whenever the power is not conferred on the receiver to conduct the business of the corporation as a going concern. *Board of Missions*, 130 La. 1079, 1080.

This paragraph applies also in the liquidation of the affairs of insolvent banks under Act 300 of 1910, p. 505, and other acts. *Board*, 130 La. 1079.

(6) We scarcely need to mention that suits brought against a syndic, receiver, or liquidator, personally, are not affected by this article, even though for damages for unwarranted acts done under color of his office. *Clossman*, 2 R. 316; *Calmes*, 12 R. 663; *Bisland*, 14 A. 175.

Warranty.

Art. 165 (Continued).

Four: In matters relative to warranty, they must

be carried before the court having cognizance of the principal action in which demands in warranty arise.

Demands in warranty. C. P. 378 et seq.

(1) This paragraph enforced. Oliver, 7 A. 590.

(2) Unless the case is one in which a call in warranty is proper under the law, the Court has no jurisdiction over the warranty feature of the case where the one called in warranty resides in another parish. 104 La. 136, 140.

It is only the defendant who can call another in warranty; therefore, if it is the plaintiff who calls in warranty one residing in another parish, the Court has no jurisdiction over such warrantor. Foote, 115 La. 35, 37, 38.

(3) Where an *Absentee* is called in warranty through a curator ad hoc, it can serve no purpose except to give the absentee notice, as far as practicable, of the pendency of the action. No personal judgment against him. Pagett, 15 A. 451; Bracy, 36 A. 796, 797; Cassidy, 40 A. 834; West, 115 La. 220; Andrews, 122 La. 464; Andrews, 125 La. 217, 51 Sou. 122.

No Known Residence, Foreigners.

Art. 165 (Continued).

Five: When the defendants are foreigners or have no known place of residence in the State, they may be cited wherever they are found.

(1) And judgment will be rendered against them for the whole debt. De Poret, 30 A. 930, 932; Williams, 52 A. 1417.

(2) But an *absent wife* cannot be brought into court by service on her husband, who is temporarily here. Crow, 45 A. 1221, 1223.

Nor is *service on an agent* effective unless the agent

is authorized to represent the absentee in the suit. Crow, 45 A. 1223; Aikmann, 122 La. 265, 47 Sou. 600.

(3) *A foreign corporation* may be brought into court in this State by any service made herein which would be good service against a domestic corporation. Gravely, 47 A. 389, 390. Therefore, service on its president while temporarily here was held good service. State vs. Buck, 46 A. 666; Gravely, 47 A. 389, 16 Sou. 866; Payne, 109 La. 706, 33 Sou. 739. And service made here on an agent of a foreign corporation at a permanent place of business conducted by the foreign corporation in this State, in a matter growing out of said business, is good. Curtis, 115 La. 918, 924. But service on the secretary of the foreign corporation while temporarily here is not a good service upon the corporation where the transaction out of which the suit arose was not one in which the secretary had acted for the corporation. Southern, 115 La. 237, 38 Sou. 977. This decision construed Act 149 of 1890, p. 188, which was then in force, but which is repealed by Act 267, 1914, Sec. 33, p. 537. The law replacing it is Sec. 26 of Act 267, 1914, p. 532. See paragraph 9 of present article.

See note 22 (b) (b1) to Art. 116.

(4) *Venue of the Suit.* The suit, under this paragraph, must be brought in the jurisdiction where the defendant is *found*. He cannot be sued in one jurisdiction and served with process in another. Gibson, 14 La. 129, 131; Amis, 9 R. 348.

And a petitory action for property situated in Plaquemines Parish may be maintained in the Parish of Orleans against a nonresident who is personally cited in the latter parish. State vs. Buck, 46 A. 656, 666. But under the reasoning of the Gibson case, *supra*, the writer believes that, this being a real action, it might also have

been brought in the Parish of Plaquemines, and the defendant cited, personally, anywhere in the State.

It is not believed that a foreign corporation, which has an established office here, or which has designated an agent in the State for the service of process, is a foreigner within the meaning of this paragraph. Therefore, subdivision (d) of Sec. 26 of Act 267 of 1914, p. 533, relating to venue of suits against foreign corporations, has no application here.

(5) *A Commercial Partnership* established in another State is not a nonresident if one of the partners resides in this State. Munroe, 2 A. 962; Shirley, 5 A. 260; Weil Bros., 126 La. 533, 534.

(6) *Estoppel to Deny Residence*. One who has been sued in the United States court as a resident of Illinois, and who there excepted that he was a resident of Louisiana, and obtained the benefit of such exception, is estopped, when sued in the Louisiana court, to assert that he is a resident of Illinois. Caldwell, 120 La. 879, 45 Sou. 927.

Joint or Solidary Obligors.

Art. 165 (Continued).

Six: When the defendants are joint or solidary obligors they may be cited at the domicile of any one of them.

(1) The words "or solidary" were first added by Act 44 of 1910, p. 70.

(2) *Joint Obligors*. Toby, 8 La. 523; Millaudon, 9 La. 547; Thompson, 3 R. 26; Stark, 5 A. 741; Adams, 25 A. 528; Oliff, 52 A. 1221.

(3) Under the old law, it was necessary that all joint obligees be made defendants in the same suit. Thompson, 3 R. 26; Van Wyck, 4 R. 140; Bourgerol, 6 R. 351; Bird, 7 R. 183; Brown, 6 A. 423; Tanner, 10 A. 485; Ellery, 18 A. 109; Forgay, 2 A. 589.

Since the passage of Act 103 of 1870, found in Acts 1871, p. 18, Sec. 2, it is no longer necessary to sue all together. Hincks, 38 A. 873; West, 115 La. 220, 221.

But, under the terms of this paragraph, all who are sued must be sued at the domicile of one who is sued.

(4) After the dissolution of an ordinary partnership the partners are jointly bound each for his share of a partnership debt. After the dissolution of a commercial partnership the former partners are bound in solido for the partnership debts. Therefore, after dissolution of a partnership this paragraph governs the venue of suits for partnership debts, superseding, at the dissolution of the partnership, paragraph 2, which only applies "as long as the partnership continues." See Marsh, 9 R. 45; Adams, 25 A. 528. See Helm, 46 A. 178.

Suits on Bonds of State and Parish Officers.

Art. 165 (Continued).

Seven: In suits to enforce the collection of bonds of State and Parish officers, the courts of the parish in which the officers exercise the duties of their offices shall have jurisdiction over the sureties, it matters not in what parish they may reside.

Prior to amendment by Act 71, 1914, p. 188, the word "sureties" in this paragraph read "securities."

See School Board, 30 A. 593.

Trespass on Real Estate; Real Servitudes.

Art. 165 (Continued).

Eight: In actions of trespass, in real estate and in all matters relating to real servitude, be they natural or conventional, the Judge of the place where the property is situated shall have cognizance of the cases.

R. S. 1203.

(1) This paragraph originally read thus: "In actions of trespass on real estate, and in all matters relating to real servitudes," etc. The slight changes crept in in the amendments of 1908 (Act 108, p. 165), of 1910 (Act 44, p. 70), and of 1914 (Act 71, p. 188). We believe that the slight changes made should be regarded as clerical errors, and that the paragraph should be construed as if it read as formerly.

(2) *Real Servitudes.* Brown, 118 La. 87, 90.

(3) *Is the jurisdiction herein conferred exclusive?* Does it oust the jurisdiction of the court of defendant's domicile? In Bernstein, 122 La. 413, where defendant was sued at its domicile for trespass on lands situated in another parish, the Court held that defendant had lost its right to except to the jurisdiction of the Court by answering to the merits.

(4) Actions against railroad companies for damages for obstruction to drainage. Act 140, 1912, p. 182.

Corporations.

Art. 165 (Continued).

Nine: * * *

This paragraph provides that where a corporation is sued *ex delicto* it may be sued in the parish where the damage was done or trespass committed.

It is reprinted with the amendment to the whole article in the Act of 1914, No. 71, p. 188, approved July 3, 1914. But the whole subject of the venue of suits against corporations is covered in the general corporation law, Act 267 of 1914, p. 521, approved July 9, 1914.

Taking the view that this paragraph is entirely superseded by paragraph (f) of Sec. 26 of Act 267 of 1914, p. 533, we print such paragraph here in the place and stead of paragraph 9.

(f) In all the foregoing cases the venue of the suit

shall, at the option of the plaintiff, be either at the domicile of the corporation, or where it has its main office, or in the parish where the cause of action arose, if it result from a trespass or offense, or quasi offense; but if the cause of action result from any other cause, the venue of the action shall be in the parish where is or was located the particular office which had supervision of the transaction from where the cause of action arose; or at the domicile of the corporation if the plaintiff so elects.

(1) Paragraph (d) of Sec. 25 of the same act (p. 532) declares the venue of suits against corporations "engaged in business in more than one parish." The provisions are exactly the same as those of paragraph (f) of Sec. 26, here printed, except that in actions for trespass, offense or quasi offense the plaintiff is given only two options as to where to bring the suit—viz., the parish where the cause of action arose, and the domicile of the corporation; instead of three, as given in the paragraph here printed; "where it has its main office" being the third option given in addition to the other two in this paragraph.

The paragraph here printed is the one occurring latest in the act, and would control in case of repugnancy between the two.

We believe that the Legislature intended to make the provisions of these two paragraphs identical, and it is unfortunate that they did not state the whole law in one clear paragraph.

Whether the courts will hold that paragraph (d) of Sec. 25 controls in the class of corporations therein mentioned, and that paragraph (f) of Sec. 26 applies only to corporations not covered by the other section, or whether they will hold that paragraph (f) of Sec. 26, being the latest and purporting to cover "all the foregoing cases,"

excludes the effect of the first paragraph, and controls in all cases, remains to be seen.

The sole difference between the two paragraphs, above pointed out, might prove in some cases to be an important difference, for a corporation does not necessarily have its "main office" in the parish of its domicile.

(2) The words "in all the foregoing cases," used in the paragraph here printed, refer to all the different modes of serving process, and have the effect of making this paragraph govern generally the venue of all suits against corporations. We do not believe that the fact that this paragraph occurs in the section relating to service of process on foreign corporations can have the effect of limiting its effect to suits against foreign corporations. The venue of suits against certain foreign corporations is covered by paragraph (d) of same section; the language of paragraph (f) precludes the idea that it refers only to foreign corporations who have no domicile in this State (if they did, they would not be foreign); and, lastly, the paragraph (f) refers to all foregoing cases, and not to cases in Sec. 26.

(3) *History.* Paragraph 9 of Art. 165, C. P., as adopted in 1870, allowed only the action for trespass or active tort to be brought in the parish where the damage was done, when that parish was not the domicile of the corporation. Actions on contract and for passive torts (neglect of duty) had to be brought at the domicile of the corporation. Castille, 48 A. 322, 19 Sou. 332, and cases therein reviewed; Culpepper, 110 La. 745, 749; Cumberland, 116 La. 125, 40 Sou. 500; Brown, 118 La. 87, 89; Devons, 121 La. 518, 520.

By Act 108 of 1908, the Legislature amended paragraph 9 so as to make it embrace all torts, whether active or passive. Police Jury, 122 La. 391; Labarre, 126 La. 983, 53 Sou. 113; Wells Fargo, 129 La. 323, 56 Sou. 257.

(4) *Actions Ex Delicto and Actions Ex Contractu.* Whatever may have been the construction of paragraph 9 of Art. 165, C. P., it is the opinion of the writer that paragraph (f), here under discussion, divides sharply actions against corporations, for the purpose of venue of the suit, into actions *ex delicto* and actions *ex contractu*.

Every action or cause of action arises from a breach of a duty owed by the defendant to the plaintiff. If the duty breached was one fixed by law, or a general duty owed by the defendant to all persons, irrespective of any contract, the action is *ex delicto*. If the duty breached arose from a contract existing between the parties, the action is *ex contractu*.

The line of demarcation is easy, except in those cases where contractual relations exist between the parties, and a tort is committed in the performance or attempted performance of the contract, or in the failure or neglect to perform properly.

Obligations for tort may be superadded to the obligations from contract, and vice versa. This occurs when the duty breached is not only a duty under the contract, but a duty under the general law. And plaintiff may sue upon either breach. 1 Ruling Case Law, Actions, Sec. 7; Ballew, 10 La. 216. And the character of the action will be determined from the allegations and prayer of the petition. Castille, 48 A. 328; Schoppel, 112 La. 201, 210; Ann. Cas. 1913 D. 226, 228.

Examples. Actions upon an officer's bond are necessarily *ex contractu*, although the action may be upon the wrongdoing of the officer. Ballew, 10 La. 216, 219; Brigham, 26 A. 676; McCloskey, 32 A. 146, 156; Fox, 83 A. 32, 33; Weintz, 44 A. 35, 10 Sou. 416; Gordon, 108 La. 182, 187; Nolan, 117 La. 431, 445.

And a suit upon an attachment bond or other judicial bond is *ex contractu*; but an illegal attachment or other seizure is also a tort, and a suit may be brought for dam-

ages therefor irrespective of the bond. Edwards, 6 R. 382, 384; Anty, 9 A. 490; De Lizardi, 25 A. 414; St. Geme, 117 La. 233.

It is implied in a contract of employment that the employer shall give the employee a safe place to work; but, where the employee is injured during his employment through the negligence of the employer, the action usually brought is in tort. Castille, 48 A. 328; Culpepper, 110 La. 746, 34 Sou. 761.

There is implied in the contract of lease that the premises leased shall be safe; but, if a member of the lessee's family is injured, an action for tort may be brought. Schoppel, 112 La. 201, 210.

A telephone company which illegally cuts the wire connecting a patron's 'phone with its central office commits a tort as well as a breach of its contract, and may be sued on either. Cumberland, 116 La. 125, 127.

A passenger who has bought a ticket, paid his fare, or stands ready to pay it when called upon, rides under a contract that he will be carried safely; but, if ejected or injured through fault of the carrier, he may sue *ex contractu* or *ex delicto*. He usually sues *ex delicto*. 5 Ruling Case Law, Carriers, Sec. 702; Dave, 46 A. 273, 14 Sou. 911; Marx, 112 La. 1085, 36 Sou. 392; 4 R. C. L., Carriers, Sec. 539.

It has been usually held in this State that the action against a carrier for goods damaged, lost or delayed in shipment is *ex contractu*. Gossin, 36 A. 186; City of Lafayette, 129 La. 323, 56 Sou. 257. The contract of *afreightment* is governed by rules peculiar to itself; but we see no good reason why a tort might not be superadded to the breach of it, as in other contracts. The venue of such suits is, however, fixed by a particular statute, which we will give post, (D).

(5) Act 134 of 1880, p. 183, Sec. 4, provides that for the purpose of suits by laborers and workingmen on

buildings and other works, on which they are given by said act a privilege for their services, corporations shall designate an office where service of process may be made, in every parish where such claims may originate.

(6) *Morgan's Louisiana and Texas Railroad and Steamship Company*, by Sec. 12 of its charter, Act 37 of 1877, p. 42, is exempt from suit, except at its domicile, on any cause of action except trespass. *Hayes*, 117 La. 594, 42 Sou. 150; *Payne*, 43 A. 981, 10 Sou. 10; *Dave*, 46 A. 275; *St. Julien*, 39 A. 1063, 3 Sou. 280; *Gossin*, 36 A. 187.

Foreign Corporations.

Art. 165 (Continued).

(d) Where the corporation has established an office in a parish other than that where its agent for service of process resides, the venue of the suit shall, at the option of the plaintiff, be in either the parish where the cause of action arose, or in the parish of the residence of the corporation's agent for service of process, if the cause of action result from a trespass, or an offense, or quasi offense, but if the cause of action result from any other cause, the venue of the action shall be in the parish where the agent for the service of process has his residence, unless the act of transaction, from which the cause of action arose, was wholly transacted or completed in some other parish where said corporation had and maintained an office. (Par. (d) of Sec. 26 of Act 267 of 1914, p. 533.)

(7) This paragraph seems to provide the venue of suits only against such foreign corporations as have an office in a parish other than that in which its agent for service resides. What about suits against foreign corporations which have the agent and office in the same

parish, or which have either an agent for service or an office, but not both? This paragraph precedes paragraph (f), *supra*, in the same section, and doubtless all cases not covered by this paragraph are covered in paragraph (f), although at first sight paragraph (f) would seem to apply only to domestic corporations.

(8) See notes 1, 2 and 4, *infra*.

(9) As to suits against foreign corporations who have no agent for service nor an office here, see note (4) to paragraph 5 of Art. 165; and note 22, (b), (b1) to Art. 116.

Insurance.

Art. 165 (Continued).

Ten: In all suits on a policy of fire, life, marine, or accident insurance or sick benefit insurance, the defendant may be sued at the domicile of the insurance company, or in the place where its principal agency is established, or in the parish where the loss occurred, or in case of life insurance, at the domicile of the deceased or his beneficiary, or in the case of accident insurance, at the domicile of the insured, or in the parish where the accident occurred, or in the parish where the accident policy was written, and in the case of sick benefits at the place where the claimant resides at the time of his sickness.

(1) *History.* This paragraph was not in the Code of 1870. A tenth paragraph, relating to life, fire and marine insurance was added by Act 22 of 1894. This was repealed by Act 108 of 1908. Act 44 of 1910 added an almost similar paragraph. Cole, 129 La. 706. This was held not to apply to accident insurance. Nolan, 132 La. 315, 61 Sou. 386; Smythe, 134 La. 368, 64 Sou. 142.

Act 71 of 1914 puts the paragraph in its above shape,

the evident purpose being to make suits upon any kind of an insurance policy as convenient as possible to the beneficiary.

(2) Most insurance companies are corporations, but of course this special statute prevails, in suits upon insurance policies, over the general law as to venue of suits against corporations, given under No. 9, *supra*. Oliver, 181 La. 712, 60 Sou. 201.

(3) *Foreign Insurance Companies*. See note 22, (b), (b2), to Art. 116; note 3 to paragraph 5, *infra*.

This ends the exceptions to the general rule of domicile which are provided by the Code of Practice. We add here such other exceptions which have been provided by law or established by the jurisprudence as we have been able to find, in order that the practitioner may have, as far as possible, all of them before him in determining where to bring his suit.

(A) *Suits Against Judicial Sureties*.

Judicial sureties are required by law to be residents of the parish where the bonds are required to be furnished, except surety companies under Act 41 of 1894, p. 45; and such sureties, even though their domicile is beyond the jurisdiction of the Court, are subject, in suit upon the bond, to the jurisdiction of the Court having jurisdiction of the proceedings in which the bond was furnished. R. C. C. 3042; R. S. 3679; State vs. Rost, 48 A. 459, and cases there cited; Whitehead, 3 A. 42; Wallace, 3 R. 411; State vs. Judge, 30 A. 583.

(B) *Suits by Laborers, etc., vs. Nonresident Proprietors of Plantations*.

Act 92, 1873, p. 163.

AN ACT to enable mechanics, laborers and others to

recover their wages, etc., and to prescribe a mode of making service of citation in such cases.

SECTION 1. (Enacting clause.) That hereafter, from and after the passage of this act, in all parishes of the State it shall be lawful for mechanics, laborers and others doing work on the plantation or plantations of the non-resident proprietors thereof to institute suit for the recovery of their wages, labor, work or portion of the crop, as the case may be, against the nonresident proprietors of said plantation in the parish in which said labor or work was done and performed.

(1) Sec. 2 provides for service upon the employee of the proprietor who is in charge of the plantation.

(2) See Art. 165, No. 5, and notes. If the agent was the employee who transacted the business out of which the claim arose, or probably the successor of such employee, jurisdiction over the absent proprietor could doubtless be obtained by service on him.

The venue of the suit here provided would doubtless control over the venue provided in Art. 165, No.

5. See note (4) to that paragraph.

(C) *Suits for Labor or Supplies Furnished to Real Estate Where Owner Domiciled in Different Parish.*

Act 16 of 1886, p. 24.

AN ACT authorizing the institution of suits for the recovery of certain claims before courts having jurisdiction of the property when the owners are not domiciled in the parish where the property is situated.

SECTION 1. (Enacting clause.) That parties holding claims against any citizen of this State for labor per-

formed, or for supplies or materials furnished, or for improvements made upon any farm or plantation, or real estate, are hereby authorized to institute suit for the recovery of such claims before any competent court having territorial jurisdiction of the property, whether the owner be domiciled or not in the parish where the property is situated.

(D) *Suits by Vendors or Deliverers of Sugar Cane or Syrup for Manufacture.*

Act 167 of 1894, p. 206.

AN ACT to authorize the institution of suits, in certain cases, in another parish than that of the domicile of the defendant.

SECTION 1. (Enacting clause.) That in all cases where sugar cane is sold by the ton or otherwise, to another, or is delivered to another person to be manufactured for a portion of the product thereof, and in all cases where cane syrup is sold or delivered to another, to be manufactured for account of the person delivering the same, for a portion of the product thereof or otherwise, all suits brought for the recovery of such cane or syrup or the product, price or value thereof as well as all suits for the recovery of damages arising from or growing out of the manufacture of said cane or syrup, or from any contract or agreement relating to the same, or for the in-execution of such contract or agreement, shall be brought, at the option of plaintiff, either at the domicile of defendant, whether such defendant be a corporation, stock company, partnership or individual, or in the parish where is situated the factory at which such cane or syrup is manufactured or delivered for that purpose, whether such parish be the domicile of such defendant or not.

VENUE OF SUITS. 165, D, 1—165, E, 2.

(1) Sec. 2 provides for service on the agent, overseer or manager of the factory.

(2) This act is not repealed by any general law providing for the venue of suits which has since been passed. Olivier, 131 La. 712, 60 Sou. 201.

(E) *Suits Against Carriers for Freight Damaged or Not Delivered.*

Excerpt from Act 80 of 1914, p. 197, which amended
Act 182 of 1908, which amended
Act 93 of 1888.

“They (carriers) may be sued either in the courts at the point of delivery or in the courts at the point of shipment or in the courts at the domicile of such steamboat or other public carrier at the option of the party bringing suit for the recovery of all freight they may fail, refuse or neglect to deliver, or for all damages arising from such failure, refusal or neglect, or for all damages done to freight while in transit.

(1) The option to sue at the point of shipment was not added until 1914.

(2) It has been held that the plaintiff had also, under Art. 165, par. 9, C. P., the option to sue at the place where damage was done to the goods en route. City of Lafayette, 129 La. 323, 325; Texas, 135 La. 144.

As we have seen, paragraph 9 of Art. 165 has been superseded by the provisions of the general corporation act; and we do not believe that the suit could now be brought where the damage was done en route, unless the action was brought ex delicto, and not ex contractu, as the action in these two cases was held to be. See note (4) under No. 9 of Art. 165, ante.

(F) *Suits Concerning Ferries on Streams Dividing Parishes.*

R. S., Sec. 2759.

"On streams that divide parishes, the parishes to and in which ferry boats ply shall have concurrent jurisdiction over such ferry; and complaints for neglect or infractions of the charter shall be cognizable by the Court of either parish."

Police Jury, 131 La. 430, 432.

(G) *Administrators, Syndics, Receivers and the like* are sued officially in the court appointing them, irrespective of domicile. Williams', 117 La. 608; Gallier, 1 R. 226.

This can scarcely be called an *exception* to the general rule, for the domicile of the court appointing them is their *official domicile*. See note 3 to Art. 162.

But it has been held that they may be sued *personally*, after removal from office, in the court appointing them, for funds which came into their hands as such officers. Rodriguez, 1 R. 535, 537.

(H) *Injunction of the Process of Courts.*

It is the general rule that execution issued by any court can be enjoined only by the court issuing the same. Carre 128 La. 205, 54 Sou. 740; Arthurs, 43 A. 414, and cases cited on p. 417.

But where property is seized in a parish other than that in which the judgment was rendered, a party claiming the property can enjoin the sale and assert his claim to the property in the parish where it is seized and advertised for sale, irrespective of the residence of the defendant in his suit. Jack, 34 A. 736, 738; Aronstein, 21 A. 199; State vs. Houston, 35 A. 538, and cases cited on p. 539; Coleman, 16 A. 110. It would seem, however, from a study of the above-cited cases, that this is per-

mitted only where it is necessary to prevent an imminent injury; and should not be permitted where the necessity does not exist. Dufossat, 18 A. 339; Bank, 127 La. 912.

(I) *Incidental Demands.*

See Arts. 153, 154, and notes.

(J) *Necessary Parties.*

Where a co-defendant is a necessary party to a suit brought against a main defendant at his domicile, the necessity of the matter requires that he be brought into the suit in the court where it is pending, though his domicile is elsewhere. Flower, 2 La. 223; State vs. Fontelieu, 30 A. 1122.

As to who are necessary parties, see note 11 to Art. 148.

But it has been held that in an action to annul a contract brought by one not a party to the contract, although jurisdiction is acquired as against one party to the contract, the other party, being a nonresident, cannot be brought into court through a curator ad hoc. West, 115 La. 213, 38 Sou. 969. See note (17), (E), to Art. 116.

(K) *Concursus; Conflict of Privileges and Mortgages.*

See Art. 126 and notes (1) and (2).

(L) *Change of Venue.*

Rev. Stat. 3901-3909; Marr's Digest, 1087-1095.

Where Defendant Resides Alternately in Different Parishes.

Art. 166. If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment, or his habitual residence.

If his residence in each appear to be nearly of the same nature, in such a case he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provisions of law, in which of those parishes he intended to have his domicile.

(1) *Residence Alternately in Different Parishes.* R. C. C. 38. ..

(a) Cited where principal residence or home establishment is. Tanner, 11 La. 175, 179; Steers, 47 A. 1557; Taylor, 17 A. 61; Hill, 4 A. 553; New Orleans, 10 A. 268; Franklin, 7 A. 411; Judson, 1 A. 79; Cole, 2 A. 950; Watson, 13 A. 337; Brewer, 11 A. 637.

(b) But where defendant resides as much, or nearly as much, in one parish as another, and has made no declaration, he may be sued in any of the parishes. R. C. C. 38; Crawford, 9 R. 243; Taylor, 17 A. 61; Villere, 23 A. 515; Short, 24 A. 45; Evans, 30 A. 498; Cole, 2 A. 950.

(c) *The Declaration of Intention* herein referred to is that provided by R. C. C. 42. As its use is only to show the intention in a doubtful case, as those under (b), it cannot control in the face of clear facts. Thus, where the defendant resides with his family in New Orleans two-thirds of the year, and only spends with his family four months of the year at his country place, he may be sued in New Orleans, although he has declared his intention to preserve his domicile at his country place. The residence in each place cannot be considered "nearly of the same nature." Judson, 1 A. 79. See, also, Yerkes, 10 A. 94; Boone, 14 La. 172.

The declaration, to avail, must also be made as prescribed by law. Taylor, 17 A. 61, 63; Waller, 8 La. 213.

The declaration controls if consistent with the facts. Hennen, 12 La. 190.

Change of Domicile.

Art. 167. If the Defendant change his domicile, he must be cited in the parish where he has resided within the last year, or within that where he has declared in the manner prescribed by law, that he intended to have his domicile.

R. C. C. 41, 42, 43.

(1) Actual residence in a place for one year fixes the domicile there. Sanderson, 20 A. 312.

(2) *Within the first year after removal* defendant may be sued either at his new domicile or at his old domicile, at the option of plaintiff, provided he has made no declaration of intention in accordance with R. C. C. 42. Vallee, 108 La. 137, 139; Ausbacher, 45 A. 988, 13 Sou. 396; Berry, 15 A. 533; State vs. Steele, 33 A. 913, and cases cited; King, 23 A. 563; Landis, 15 A. 213. But to permit suit at the new dwelling place the requirements of Art. 168 must obtain.

(3) As to *Declaration of Intention*, see note (1), (c), to the preceding article.

Residence of Less Than One Year, Suit at.

Art. 168. If the defendant has not made such a declaration, he may, nevertheless, be cited in the parish where he lives, though he has not resided one whole year in it, if he has done in that parish acts which manifest sufficiently that he intended to make it the place of his domicile.

R. C. C. 41.

(1) *A Change of Domicile* is produced by the act of residing in another parish, combined with the intention of making one's principal establishment there. Waller, 8 La. 213.

Each case must be decided on its own facts. Thus, where a planter moved to New Orleans to try the commission business, rented an office for some time, and kept his family at a boarding-house there, it was held that he could not be sued in New Orleans two months after such location there. Williams, 18 La. 557; Bank, 2 R. 128. In another case it was held that the defendant was a floating character, and had no domicile at all. McKown, 19 A. 545. And moving to a town in another parish for a temporary purpose, such as sending his children to school, where defendant manifested in various ways his intention to retain his former domicile, was held not to constitute a change of domicile. McGehee, 4 A. 186. See Evans, 8 N. S. 247; McKowen, 15 A. 638; Folger, 19 A. 323.

On the other hand, where the removal is of a permanent nature, defendant may be sued at present dwelling before the year has elapsed. Lacock, 9 A. 162; Rippey, 8 M. 709.

Where a person removes from one parish to another, and, when sued in the latter, sets up that his domicile is in a third parish, in which he has never resided, he will be held to have admitted that he has abandoned his former domicile, and jurisdiction of the suit will be maintained. Alter, 20 A. 246.

(2) A domicile once acquired is presumed to continue until it is shown to have been changed. To constitute the change, *there must be a residence in the new locality, and an intention to remain there.* The animus

manendi may be shown by the proof of any facts manifesting it. Steers, 47 A. 1551, 18 Sou. 503; Marks, 110 La. 659, 34 Sou. 725; Simmons, 109 La. 1095, 34 Sou. 101. Change of residence is not enough; there must be also the intention to make the new residence permanent. Kinder, 125 La. 594, 51 Sou. 654. Facto et animo. Ballard, 113 La. 235, 239, and cases cited; Sanderson, 20 A. 312; Franklin, 7 A. 395.

(3) *Between Different States.* The same tests are to be applied in determining the domicile between this State and another as between two parishes of this State. Hyman, 44 A. 108, 116; Marks, 110 La. 659, 34 Sou. 725; Kinder, 125 La. 594, 597; First Bank, 123 La. 1018, 1024, and cases cited; Steers, 47 A. 1553; Simmons, 109 La. 1095, 34 Sou. 101; Hewes, 48 A. 1303.

Voluntary absence of two years forfeits domicile in the State. R. C. C. 46; Dumas, 32 A. 679, 682.

It takes two years bona fide residence here, under the present Constitution, to acquire a political domicile here by a person coming here from another State; but such a person may be sued here as soon as he establishes a residence animo manendi; and his property cannot be attached on the ground of nonresidence. Wesson, 13 A. 436; Winter, 12 A. 200; Amis, 9 R. 348. These cases overrule Boone, 14 La. 169, and State vs. Judge, 2 R. 449.

(4) *A Declaration* in an authentic act, or in a pleading in another suit, that a party is a resident of a certain place, while admissible as evidence against him, does not conclude him on the question of domicile. New Orleans, 10 A. 268; Sanderson, 20 A. 321; Dohan, 40 A. 376, 4 Sou. 338; Seymour, 52 A. 131, 24 Sou. 818. And much less are his declarations conclusive in his favor. Watson, 13 A. 337.

SECTION 3.

Of Petition and Citation.

Amicable Demand.

Art. 169. It is not necessary, previous to bringing a suit, to make an amicable demand in writing.

(1) Amicable demand is not necessary when defendant resides out of the State, or when the suit is commenced by arrest or attachment. R. S. 520.

Absentee. Millaudon, 2 A. 916.

(2) *Effect of Amicable Demand.* This is an article which, at the present date, attracts no attention from the courts. It was in the early reports the subject of frequent adjudication. It has never been given any effect except as concerns the costs of the suit.

It was early settled that the provision that it is not necessary to make an amicable demand in writing is a negative, pregnant with the affirmative, that a verbal demand is necessary before suit. The court law of 1813, Sec. 31, required a demand, either verbal or written, before suit, and this article left that law unrepealed. Mead, 7 N. S. 264; Bailey, 8 N. S. 114, 117; Tietjen, 1 La. 268; Morris, 4 La. 147, 151.

The effect of the want of amicable demand in all of the above cases was to put the costs of suit on plaintiff, although he recovered judgment. Brunel, 6 La. 713, 715.

In Howard, 1 La. 417, 419, it was held that amicable demand must be specially denied in order to put plaintiff to the proof of it.

And in Fox, 4 La. 104, it was held that the want of amicable demand, in order to avail defendant, must be specially pleaded in *limine litis*. Also in Coon, 7 La. 266, 270; Police Jury, 1 R. 389; Fisk, 3 R. 264; Dubuch, 3 A. 407.

In *Armory*, 13 La. 264, 268, it was declared that the law requiring amicable demand before suit has no other purpose than to give the defendant an opportunity to satisfy plaintiff's claim and save costs; that where amicable demand was not made, if defendant, upon citation, complies with the prayer of the petition, the costs must be borne by plaintiff; but that if, instead, he comes into court and defends the action, and judgment goes against him, he must pay all costs after his first appearance in the suit.

This doctrine was affirmed in *Saillard*, 14 La. 259, where plaintiff, without previous amicable demand, recovered all costs except those of original citation; and in *Varion*, 18 La. 40; and in *Wood*, 9 A. 265.

But in *Phelps*, 13 A. 441, it was held that, although the want of amicable demand was pleaded in *limine litis*, if plaintiff's claim is resisted, he is entitled, upon recovering judgment, to also recover all the costs. And in *Nelligan*, 20 A. 547, it is held that, to make the exception of want of amicable demand available as to costs, the defendant must show a readiness to comply. In this case, the defendant, on appeal, having no other ground for reversal than said exception, was mulcted in damages for frivolous appeal. In *Smith*, 23 A. 8, although interest was not allowed because payment had not been demanded, still plaintiff was allowed all of his costs. See *New Orleans*, 105 La. 290.

It is interesting to trace the evolution of the law as shown in the foregoing cases. The earliest decisions hold that allegation and proof of amicable demand is a necessary part of plaintiff's case, on failure of which he must pay all costs, even though he recovers. It is next held that to have this effect amicable demand must be specially denied. It is next held that it is a matter of defense, to be specially pleaded by defendant in *limine*, in order to put the costs upon plaintiff. It is next held that,

even where specially pleaded in limine, if defendant resists the claim, it saves him only the costs preceding his appearance. And finally it is held, as we believe to have been the undisputed law ever since the Nelligan case, *supra*, that, unless the defendant complies with the demand upon service of petition and citation, the want of amicable demand avails him nothing—saves him no costs.

From the foregoing it may be readily deduced that the only effect of failure to make amicable demand before suit will be to save defendant the costs, provided he, within a reasonable time and without making defense at all, either complies with plaintiff's demand or shows a proper readiness to so comply. We believe that "readiness to comply" can be shown only by tender or offer to comply. It scarcely need be added that where the defendant, in such case, acts within proper time, he need not offer or tender the costs which have been incurred.

(3) *What Constitutes Amicable Demand.* A mere verbal request by plaintiff's attorney for a settlement. Hough, 6 La. 677. Presentment of the account by any agent. Ott, 8 La. 109. The usual notice to the drawer or endorser of presentment, demand and nonpayment. Gas Bank, 19 La. 459; Cain, 15 La. 494; Flower, 4 R. 78. And statement of such notice in the protest is sufficient proof. Same cases.

Where the wife is the debtor, it is sufficient to make the demand on her, and not necessary to make it on her husband also. Flogny, 12 M. 82.

How Action Commenced.

Art. 170. Every demand in writing must be commenced by a petition.

(1) Writing required. C. P. 159.

(2) The only exceptions to this rule that a demand

must be begun by written petition are embraced under the head of "Summary Proceedings," or "Proceedings by Rule." Such proceedings, without a regular peittion and citation, are only allowed in the cases specially provided by law, and such laws will be strictly construed.

See C. P. 754 to 757, inclusive; Art. 98, ante, and notes to the third paragraph thereof.

(3) *Illustration.* Opposition to a tableau of distribution must be in writing. Ludeling, 4 N. S. 601; Saul, 7 N. S. 445; Conrey, 8 A. 371; Metropolitan, 51 A. 1530.

(4) The petition may in certain cases be filed in a pending proceedings, and bear its number. McDermott, 51 A. 175.

Definition of Petition.

Art. 171. A Petition is a written document which the plaintiff addresses to a competent judge, setting forth the cause of the action which he intends to bring against the defendant, and praying to be permitted to cite that defendant before him, in order that he may be ordered to do or to give a certain thing.

(1) Mere mechanical arrangement is left to the taste of the attorney. A printed blank form may be used for part of the petition, and pen or typewriter used for the remainder, or to fill in blanks. And it matters not that sheets of paper of different colors are used. Lukis, 45 A. 1447, 14 Sou. 186.

Requisites of Petition.

Art. 172. The petition must be drawn in the English language, and it must mention:

(a) *English Language.* But the description of prop-

erty as contained in an act of sale or mortgage declared on may be copied into the petition in the French language. *Generes*, 21 A. 654.

This article formerly provided that, when either party speaks the French language as a mother-tongue, the petition must be in both English and French. It was held that the exception that it was written in English only, to be effective, must be pleaded in limine. *Leon*, 21 A. 651; *Ortes*, 4 A. 188; *Leeds*, 4 R. 257. And amendment was permitted by allowing a French copy to be filed and served. *Thomas*, 7 La. 410, 413. And service of the English copy, only, interrupted prescription. *Leon*, 21 A. 651; *King*, 118 La. 345.

1. The name or title of the court to which it is addressed.

(b) *Form*. "To the Honorable Twenty-seventh Judicial District Court of the State of Louisiana, in and for the Parish of Assumption."

(c) A Judge can take no action on a petition addressed to another court than his own. *Watson*, 6 N. S. 416; *Wadsworth*, 1 R. 96.

But the omission of the words "of the State of Louisiana" is not a material defect. *Adams*, 7 N. S. 401; *Lal-lande*, 12 La. 7. Nor is a clerical error in the number of the district where the parish in and for which the court is held is correctly stated. *Clark*, 45 A. 502, 505.

2. The name, surname and place of residence of the plaintiff.

(d) *Form*. "The pétition of Leonce J. Himel, who resides in the Parish of Assumption, respectfully SHOWS."

(e) *Name*. Plaintiff may sue in his real name—that of the country of his nativity—although he has borne a different name here. He must not sue in a fictitious

name. It is better to give both names with explanation.

De Renzes, 115 La. 675, 39 Sou. 805.

The surname and at least one other name of plaintiff must be stated. The initial will not suffice in lieu of the other name. Lee, 12 La. 254. But one name besides the surname will suffice, and the other names, if any, may be represented by initials. Shipman, 17 La. 504.

If, however, the plaintiff has only one name, that will suffice. Rachel, 34 A. 110.

(f) *A Married Woman or Widow* may sue in either her maiden name or her name after marriage. Donaldson, 1 La. 35.

Where the husband joins as plaintiff for the purpose of authorizing his wife (see Art. 106, note 1), his name and surname must be given.

Proper and Safe Style for Married Woman. "The petition of Edith Dyer, wife of J. Hall LeBlanc; and of said J. Hall LeBlanc, for the purpose of authorizing and assisting her, both residing in the Parish of Assumption, respectfully SHOWS."

This form is for use where the wife is authorized by her husband. If the wife sues her husband (Art. 105), or for any reason the husband does not or can not authorize her, this form must, of course, be varied.

Proper and Safe Form for Widow. "The petition of Lucy Phelps, widow of Arthur Marquette, she being a resident of the Parish of Assumption, with respect SHOWS."

(g) *Agent.* Where plaintiff sues for the use of others, it has been held that he does not have to state the Christian names of those others, this article being complied with by his giving his own name in full. Kilgour, 2 N. S. 296; Filhiol, 5 M. 636.

But the agent who sues in his own name is bound to

disclose the name and residence of his principal. Willard, 24 A. 18. In order that defendant may set up such defenses or counter-claims as he has against the real plaintiff. Smith, 41 A. 1, 3.

(h) *Corporation, Form.* "The petition of Dugas & LeBlanc, Limited, a corporation organized under the laws of the State of Louisiana, and domiciled in the Parish of Assumption, respectfully SHOWS." See Art. 112 and notes.

Suit must be brought in the corporate name. Sec. 7, (c), of Act 267 of 1914, p. 525. R. C. C., Art. 432. A slight alteration in the name is not important. R. C. C. 432; Canal, 19 La. 365.

(i) *Partnership.* Suit by a partnership should be brought in the firm name, and as appearing through all the partners. The full names of the partners should be set out, and their residences. But the petition must be that of the partnership, and not of the partners. Wolf, 52 A. 1357, 1365.

Form. "The petition of B. J. Wolf & Sons, a commercial partnership, domiciled and doing business in the City of New Orleans, and composed of Samuel A. Marcuse, Abraham J. Wolf, and Marcus Wolf, all of whom reside in the Parish of Orleans, with respect, SHOWS."

Compare with incorrect form. 52 A. 1358.

But after the dissolution of the partnership suit may be brought in the names of the individual partners. Ter- ril, 6 M. 637; Crozier, 3 La. 357; Cutler, 13 La. 482; Hyde, 19 La. 402; Shipman, 9 R. 149; Hilliman, 4 A. 179; Silvernagle, 21 A. 189; Dunn, 115 La. 1084, 1087. And all of these decisions hold that all the former partners or their representatives must be joined in a suit upon a debt to the former partnership. Certainly all would have to be joined in order to recover the whole debt; but upon dissolution does not each partner become a joint obligee,

and might not each sue separately for his share Perhaps not. But see note 9, (d), to Art. 148; note 2 to Art. 165, two; note 4 to Art. 165, six.

(j) *Residence.* Where plaintiff is not a resident of Louisiana, it is sufficient to describe him as a resident of the State of Missouri, or of the Republic of France, as the case may be. Simpson, 14 A. 104; Perry, 5 N. S. 78. And where plaintiff is a resident of Louisiana it is sufficient to give the parish of his residence without naming the State. Adams, 7 N. S. 400; Chaffe, 28 A. 837.

(k) *Effect of Failure to State Full Name or Residence.* Provided the plaintiff is sufficiently identified, the failure to state his full name or residence, as here required, has no effect, unless excepted to in limine litis, by dilatory exception. Taylor, 21 A. 665. And then the petition may be amended instantly by inserting the full name or the residence, as the case may be, without further service of petition or amendment or citation, and without allowing defendant further time to answer. Sinnet, 3 M. 398; Dubuys, 2 N. S. 626; Psyche, 6 La. 380; Thomas, 7 La. 418; Smith, 5 A. 575; Flynn, 21 A. 168; Chaffe, 28 A. 837; McMullen, 3 A. 139; Daugherty, 30 A. 1247.

Compare note (q).

3. The name and the place of residence of the Defendant, or the place where he lives.

(l) *Name.* It will be noted that the name and surname of the defendant are not required, as in the case of the plaintiff. Lallande, 12 La. 7; Parmeley, 13 La. 353.

Where defendant is sued upon a note, and is named in the petition as Elizabeth T. Russell, while her correct name as signed to the note is Elizabeth W. Russell, the

note being annexed to the petition corrects the error and makes it immaterial. Tenney, 1 R. 449, 451.

(m) *Residence*. What has been said in note (j), *infra*, as to stating the residence of the plaintiff, applies to stating that of defendant. Adams, 7 N. S. 401.

(n) *Form*. The name and residence of the defendant are usually stated in the clause which declares the nature or the object of the suit. Thus, immediately after the form (d), *supra*, follows:

"That Sam A. LeBlanc, a resident of the Parish of Assumption, is indebted unto your petitioner in the sum of three hundred dollars, with interest at five per cent. per annum from May 1, 1914, for this, to wit."

This entire form can only be used where a money judgment is sought. If something else is demanded, this form cannot, of course, be used; but the name and residence of defendant must be stated somewhere in the petition.

(o) *Suit Against a Married Woman*. See Art. 118 and notes; note (f), *infra*.

(p) *Against Corporation*. See note (h), *infra*. *Partnership*. See note (i), *infra*. If defendant partnership excepts that all partners are not named, it must supply the names. David, 4 La. 106, 107.

(q) *A Mistake in the Name of Defendant*, where the proper person is served and comes into court, may be corrected by amendment, *instanter*, without further service, and without granting further delay for defense. Brewster, 8 La. 296, 298; Lallande, 12 La. 7; New Orleans, 11 A. 420; Hickman, 14 A. 609.

And the same is true as to failure to state the residence of defendant. Segur, 11 La. 439, 445.

And such a defect is waived by a plea to the merits. Parmely, 13 La. 351; Anselm, 6 La. 142.

And if defendant excepts that his name is not correctly stated, and does not give his true name, his exception is frivolous. *Broadwell*, 14 A. 456.

Compare notes (k), (bb).

4. The petition must contain a clear and concise statement of the object of the demand, as well as of the nature of the title, or the cause of action on which it is founded.

(r) We have under Art. 161 discussed the subjects of "Vagueness" and "No Cause of Action Disclosed," which see. We subjoin here other observations on

The Statement of the Cause of Action.

A party is held to his material and substantive allegations, and cannot derive advantage from contradiction or obscurity. *Blackley*, 3 A. 366; *Perkins*, 8 A. 14; *Parish*, 8 A. 154.

(s) *Variance* is a discrepancy between an allegation in the pleading and the evidence adduced to prove it. A material variance will, on objection being made to the evidence, be fatal. Thus, where actual sale and delivery are alleged, a conditional agreement to sell made on a different date cannot be proved. *Davenport*, 118 La. 190, 42 Sou. 770.

But where the note or other obligation sued on is annexed to the petition as part thereof, there can be no variance between the document sued on and the description of it in the petition, because the document itself controls and corrects the allegations. *Davenport*, 6 N. S. 127, 128; *Weyman*, 13 La. 492, 493; *Hughes*, 7 N. S. 227; *Deblieux*, 7 N. S. 260; *Police Jury*, 27 A. 224; *Teutonia*, 33 A. 732, 733; *Abadie*, 41 A. 281; *State vs. Wagner*, 42 A. 54; *McLellan*, 43 A. 258; *Vincent*, 50 A. 379. And the same is true where the document is referred to as an-

nexed to a pleading in another case in the same court. Compton, 6 La. 272.

Where an instrument is not of the gist of the action, a slight variance in describing it is immaterial. Baldwin, 3 N. S. 61. And, even where the instrument is of the gist of the action, an inaccuracy in describing it will not prevent its admission in evidence where it is sufficiently identified. Lejeune, 2 A. 145.

But a variance will be cured by the reception of the evidence without objection, and plaintiff will be permitted to recover according to his proof. And so, if plaintiff sues in one capacity, and, without objection, proves the right to recover in another capacity. Canfield, 9 M. 317; Bryan, 11 M. 26; Jackson, 11 M. 297; Flogny, 11 M. 547; Langlini, 12 M. 242; Brown, 1 N. S. 211; Rodriguez, 2 N. S. 358; McMicken, 6 N. S. 85; Russell, 2 La. 185; Powell, 18 La. 321; Draper, 20 A. 306; Gaty, 32 A. 1092; Fontenot, 46 A. 1380; Zeigler, 49 A. 189; Godden, 35 A. 164; Gayarre, 9 A. 354; Hennen, 20 A. 241; Louisiana, 25 A. 560, 562.

(t) *Evidence of Facts Not Alleged.* In like manner, if evidence is offered of facts not alleged in the petition, and objection is not made, the petition will be considered enlarged by the evidence, and it will be given effect. Wykoff, 48 A. 475, 479; Houston, 127 La. 630, 53 Sou. 887; Parish Board, 125 La. 809, 812; McLellan, 43 A. 258.

And vagueness in petition may be cured by allegations of answer or evidence received without objection. Burland, 14 La. 189; note 2 to Art. 161.

And demand in reconvention, proved without formal plea, but without objection, will be given effect. Kean, 17 A. 37.

And even where petition does not show a cause of action, if such plea is not insisted on in limine, and plaintiff is permitted to prove facts which, if alleged, would

have shown a cause of action, the defects of the petition are cured. Bell, 107 La. 725, 733.

But all the above must be taken with the restriction that the judgment must be limited to what is claimed in the petition. Art. 156, and note (3) thereto; Knight, 130 La. 234, 241; Hanson, 130 La. 688, 58 Sou. 511; notes (z) and (aa), *infra*.

And with the further restriction that evidence received without objection does not have the effect of broadening the pleadings where admissible for the purpose of any issue raised by the pleadings. Tensas, 128 La. 172, 181; Rogers, 119 La. 715, 44 Sou. 442; Bonnette, 111 La. 855, 35 Sou. 953.

But, if objection is timely made, such evidence will be excluded. Dumartrait, 5 N. S. 38; Ponsonby, 6 N. S. 238; Benoit, 1 La. 212; Rowley, 2 A. 209; Graham, 13 A. 546; Alexandria, 109 La. 50, 33 Sou. 65; Stone, 3 La. 349; Wisdom, 120 La. 700; State vs. Foster, 106 La. 425.

And evidence of facts not pleaded cannot be offered on confirmation of default. Hall, 10 A. 412; Barbarin, 3 N. S. 639.

(u) *Contract and Quantum Meruit*. While one who sues on a contract cannot recover on the quantum meruit, and vice versa (Morton, 9 La. 172; Mitchell, 11 La. 255; Hogan, 12 La. 457), still, in a suit upon a contract, evidence can be given of the value of the work performed or goods delivered. Gribble, 14 A. 793; Lacroix, 15 A. 69; Boyd, 3 N. S. 286; Gourgon, 4 La. 115; Collings, 14 La. 339; O'Neill, 123 La. 104.

(v) *Negative Allegations*. A plaintiff is not required to negative, in his petition, facts the existence of which would defeat his action. Thus, he is not required, in an action based on injury through the negligence of defendant, to allege the absence of contributory negligence on his own part. Hebert, 126 La. 775, 778; Buechner, 112 La. 599, 36 Sou. 603.

But where it is necessary for plaintiff to prove the non-existence of fact in order to recover, the nonexistence of such fact must be alleged. Mathews, 13 La. 47, 52.

NOTE.—Author's No. 8, post, contains matter which properly belonged here under No. 4, for it refers to no other part of the petition. It was thought that to give it a separate number would avoid confusion.

5. It must not contain any insulting or impertinent expression.

(w) It is within the discretion of the Judge to dismiss the suit when the petition contains, in his judgment, such expressions; and his discretion cannot be controlled by mandamus. The remedy is by appeal. State vs. King, 43 A. 826, 9 Sou. 640.

6. It must end by conclusions analogous to the nature of the action to which the plaintiff has resorted.

(x) By "conclusions" is meant the prayer for relief. Woolfork, 20 A. 515.

(y) *The Prayer*, more than anything else, determines the character of the action. Art. 43, note (5); Art. 46, note (1); Edwards, 20 A. 169; Lagay, 5 R. 132; Slocomb, 21 A. 355.

The prayer for relief should be specific and conform to the allegations. Maisonneuve, 130 La. 714, 58 Sou. 520.

(z) *Relief Beyond the Prayer*. The general rule is that there can be no relief beyond the prayer of the petition. See Art. 156, and note (3) thereto; note (t), *infra*; New Orleans, 49 A. 49.

(aa) But *Prayer for General Relief* will warrant the granting of any relief covered by and within the scope of the allegations of the petition. Henderson, 10 A. 548; Gottschalk, 6 La. 219, 221; State vs. Lapeyrollerie, 38 A. 912; Haas, 125 La. 1034, 52 Sou. 149; Kinder, 125 La.

595, 51 Sou. 654; Ice Co., 106 La. 55; Stark, 118 La. 489; Crusel, 122 La. 913.

But the prayer for general relief will not authorize a change from one form of action to another. South, 119 La. 197. Nor does it authorize the granting of relief not covered by the allegations, or *ultra petitionem*. Lichenstein, 115 La. 1051, 40 Sou. 454.

7. It must be signed by the plaintiff or his attorney in fact, or by his advocate.

(bb) Signature to an affidavit which the law requires to be annexed to the petition is a sufficient signature of the petition. Zollicoffer, 3 R. 236.

And the signature of the attorney is sufficient without his being described as the attorney. Merrill, 12 R. 138.

And even the attorney may sign through an agent. 11 A. 121.

Such mere defects of form can be amended *instante* without further service or delay for answering. Merrill, 12 R. 138.

Paragraph for Each Fact.

8. (Author's Number.) The plaintiff in his petition shall state his cause of action articulately, that is to say, he shall, so far as practical, state each of the material facts upon which he bases his claim for relief in a separate paragraph, separately numbered. The petition shall be in all cases verified as hereinafter provided. (Extract from Sec. 1 of Act 300 of 1914, p. 612.)

(cc) This law requires that *each fact on which the cause of action is based* be stated in a separate, numbered paragraph. It is manifest that this requirement applies only to that part of the petition in which the cause of action is stated—that referred to in No. 4 of Art. 172. It is manifest that this requirement has no application to the other parts of the petition, such as the name, description, and residence or domicile of plaintiff or defendant, the prayer, etc.

Therefore, it is folly for the plaintiff to state in one of the separate, numbered paragraphs the fact that it is a corporation organized under the laws of Louisiana; or that it is domiciled in the Parish of Lafourche; or any like matter.

Such matters are matters to be specially denied or put at issue, by the defendant, in limine; otherwise, they will be excluded from the issues of the case.

Why, therefore, should plaintiff, by putting any such matter into a separate, numbered paragraph, invite, or rather compel, defendant to deny it, and thus put upon itself the burden of producing its charter or other evidence?

The writer has in his experience known several cases where the plaintiff would have succeeded on its rule, taken under paragraph 4 of Sec. 1 of Act 300 of 1914, and obtained judgment upon the allegations of the petition and answer, had it not tendered as an issue in the case the fact of its corporate existence. This fact, being denied by defendant, was the only allegation remaining to be proved, and defeated the plaintiff's rule.

(dd) This law is not complied with by simply dividing the statement of the cause of action into numbered paragraphs. Each substantive fact going to make up the cause of action should be stated in a separate paragraph in such manner and with such minuteness that the defendant can answer each paragraph or article with a simple "admitted" or "denied," without having to admit in part and deny in part, or answer it in any other manner than categorically.

NOTE.—Author's No. 8 should more properly be a subdivision of No. 4, ante, for it refers only to that part of the petition.

Verification of Pleading.

9. (Author's Number.) The petition or answer, as the case may be, shall be verified by the plaintiff or the

defendant, if a natural person, or a member of the firm if a partnership, or, in the case of a corporation, by the president, vice-president or other managing officer thereof; provided, however:

(a) The joint petition or answer of several plaintiffs or defendants may be verified by any one of said joint plaintiffs or defendants.

The verification in the case of parties shall consist in an affidavit to the effect that all of the allegations of fact made in the petition or answer are true except as to those allegations expressly made on information and belief, and that as to these, the affiant believes them to be true.

(b) The petition or answer may be verified by the attorney of the party or parties in all cases.

Want of verification or defective verification must be taken advantage of, if at all, in the case of a petition, by exemption (sic, should be "exception") filed in limine litis, and in all such cases the Court may in its discretion allow the verification to be supplied or amended upon terms as to payment of costs, or otherwise, as it may deem proper.

* * * * *

A verification by the attorney of a party or parties for a reason deemed by the Court insufficient to justify such form of verification shall not be treated as a defective verification, but the Court shall in such case require pleading to be verified by the proper party within a delay to be fixed by the Court, and such verification shall be retroactive in its effect; provided, that this paragraph shall in no way vary or affect the foregoing paragraph as to the conclusiveness of verification when made by coun-

sel in the cause. (Extracts from Act 300 of 1914, pp. 613, 614.)

(ee) *Verification by Party, Member of Firm, or Officer of Corporation.* When the petition is to be verified by any of these, care must be taken in the drawing of the petition to see that it shows upon its face which allegations are made as positive facts, and which are made upon information and belief. All the allegations must be in one or the other of these two classes. When this is done, proper verification is easy. It should follow the wording of the law—the second paragraph under (a), *supra*.

(ff) *Verification by Attorney.* This subject is not without difficulty, under the wording of the present law. Act 157 of 1912, p. 227, permitted verification by the attorney only in certain cases, and provided the form for verification by the attorney.

The present law—*supra*, (b)—provides that the attorney may verify in all cases, but fails to give a form of verification when made by the attorney. It would certainly be helpful if the lawmakers had allowed the paragraph in the act of 1912 which provided the form for the verification by an attorney to be reproduced in the act of 1914. The subject would then be clear.

As it is, the law now makes no provision as to what the verification by an attorney shall state.

It would very rarely happen that an attorney could swear to the allegations of the petition, except upon information and belief; and, as the law now provides that the attorney may verify in all cases, we believe it to be permissible for the attorney to make the affidavit upon information and belief as to *all* the allegations of the petition, without the necessity of making the allegations in the petition itself upon information and belief.

(gg) *Amendment of Verification.* Much discretion

allowed trial Judge in permitting verification to be supplied or amended; and, unless such discretion has been abused, there will be no interference therewith on appeal. Clark, 134 La. 440, 443.

(hh) *Verification by Attorney Other Than Counsel in the Case.* The clause (b) of the act of 1914, printed supra, would seem to refer only to an attorney who is counsel for the party in the case. And nowhere else in the act is provision made for verification by an attorney.

But the last paragraph, which we have printed supra, of the act of 1914 provides what is to be done when the verification is by the attorney for a reason deemed insufficient by the Court. This paragraph seems meaningless and out of place, since the provision is that the attorney may verify in all cases. The last clause of this paragraph, however, seems to interpret the foregoing provision (b) as applying only to counsel in the cause. To give this paragraph any effect at all, therefore, we must interpret it as applying to verification by an attorney in fact, or an attorney other than counsel in the cause, or any other agent.

Demand for Specific Object.

Art. 173. If the plaintiff demand a specific object, he must describe it with certainty in his petition, in such a manner as to leave no doubt as to the object demanded.

C. P. 161; 172, 4.

(1) In a petitory action the land sought to be recovered must be so described as to make its location certain. Bry, 11 A. 665.

And in actions concerning rights attached to lands the lands must be described with certainty. Pipes, 1 R. 19.

(2) While a less degree of certainty and particularity

of description is required when personal property is sought to be recovered, still the petition must identify the property claimed with certainty. Curtis, 110 La. 429, 431. And the opposing party may plead vagueness. Curtis, 110 La. 431.

Action Upon Authentic Act.

Art. 174. When the action is founded on a notarial or public act, an authenticated copy must be annexed to the petition, in order that it may be communicated to the defendant, if he require it; but it shall not be necessary to serve the same on the defendant.

(1) Defendant may refuse to answer if such document not annexed. C. P. 320. This is the sole penalty for failure to annex the document, and such failure cannot be taken advantage of by exception of no cause of action. Hilliard, 114 La. 884, 894; Smith's, 2 La. 132, 133; Police Jury, 27 A. 224.

But the defendant may pray for oyer of the documents, and the Court will fix a delay within which they must be filed, under penalty of dismissal of the suit. Maillon, 14 A. 621, 622; Baldwin, 124 La. 547; Hewitt, 47 A. 742, 746.

(2) Documents annexed control and correct allegations of petition. See note (s) to Art. 172.

Action Upon Other Documents.

Art. 175. But if the title on which the demand is founded be an act under private signature, or a note bearing the signature of the defendant, it shall not be necessary to annex to the petition the original of such an act, or the note itself, provided that if the defendant pray a view or oyer of the document declared upon, the

court shall order the same to be filed within a reasonable delay, and in default of the plaintiff's complying with said order, his petition shall be dismissed.

(1) Defendant's right to oyer of the document sued on is absolute, and may be exercised at any time before default is taken. Maxwell, 2 N. S. 211; Lee, 3 A. 233; Davenport, 118 La. 193.

(2) A statement in the petition that such document is made part thereof, when in truth it is not annexed or filed, is mere surplusage. Lee, 3 A. 223. And is not to be considered in deciding exception of no cause of action. Lamorene, 32 A. 1045.

(3) This article formerly required such documents to be annexed to the petition, but especially provided that copies of such documents need not be served upon the defendant. Under the article as it then stood, it was decided that copies of such documents need not be served with the petition, even though the petition itself stated that they formed part of it. Osborn, 4 A. 297. At this day, under the article as it now reads, it seems generally conceded that copies of annexed documents need not be served.

(4) An account annexed to a petition "for reference" amplifies it, and admits proof of the items thereof. Lockhart, 41 A. 1165. And the annexed documents are so far made part of the petition that they must be considered in determining exception of no cause of action. Scarborough, 43 A. 315, 8 Sou. 940.

(5) Defendant cannot demand oyer of documents not sued on, or not directly in issue in the suit. Consolidated, 10 A. 610. Therefore, oyer of title cannot be demanded of plaintiff in a jactitation suit. Williams', 117 La. 600, 42 Sou. 153.

(6) Defendant is not entitled to pray oyer of a docu-

ment filed in a cause in court. Cincinnati, 25 A. 1. No reason is given; but, presumably, the reasons are that the document, being on file in a public office, is not under the control of plaintiff, and is as accessible to defendant as to plaintiff. For the same reasons we are inclined to believe that oyer cannot be demanded of a public record or of a document which the law requires to be deposited and kept in a conveyance office or other public office; especially in the parish where suit is pending.

Filing Petition, etc.

Art. 176. The petition, together with all the annexed documents, must be delivered to the clerk of the court to which it is addressed, who shall receive it, and endorse immediately the date of the day, month and year when he received it.

(1) Delivering the petition to the clerk or his deputy makes it a part of the record. The date of receipt by the clerk may be endorsed at any time thereafter nunc pro tunc. Wheeling, 48 A. 777, 779. But compare Ford, 35 A. 151, 153; Grunow, 36 A. 927.

How Service May Be Waived.

Art. 177. The defendant, or his attorney, may waive the service of plaintiff's petition, provided the defendant, or his attorney, certify in writing, and under his signature, on the back of the original delivered to the clerk, that he acknowledges that the petition has been duly served on him; in such case the clerk shall not be entitled to charge for a copy, nor the sheriff for citation.

(1) It is only the defendant who is sui juris and domiciled or represented in this State, or his attorney, who can waive service of petition. An appointee of the

Court, as a curator or tutor ad hoc, is without authority to do so, and cannot. Jacobs, 135 La. 390, 394; note 13 to Art. 116; see note (7), below.

The Sheriff, when made a co-defendant in injunction, may accept service. Tinney, 134 La. 549, 551.

(2) The words "service accepted and citation waived," while not precisely in the form required by this article, accomplish the entire purpose. State vs. Stringfellow, 126 La. 729. But we suggest that the date should be added to fix the beginning of delay for answer.

(3) Prior to the Constitution of 1898, one could confess judgment and waive citation at any time, even at the time of incurring the obligation. Stein, 42 A. 772, 7 Sou. 718; Thompson, 47 A. 1403; State vs. Baten, 48 A. 1538, 21 Sou. 119. Under Art. 91 of the Constitution of 1898, this cannot be done prior to the maturity of the obligation sued on *by any document under private signature*. Goodwill, 51 A. 521; Kiernan, 111 La. 645.

(4) It seems that this article does not provide the exclusive mode of waiving citation. Stein, 42 A. 774; Toledano, 7 A. 60. But the Sheriff's return that citation was waived amounts to nothing whatever. Shannon, 15 A. 86.

(5) The dignity of the profession, the convenient administration of justice, the sanctity of an attorney's oath, all justify the presumption of the authority of an attorney who waives citation; and no proof need be offered unless the matter is especially put at issue. Ingram, 2 A. 840, 841; Hill, 3 A. 258; Boykin, 6 A. 120; Wood, 32 A. 801, 803.

But the defendant may avoid a judgment against him by showing that the attorney who waived citation had no authority from him. Marvel, 14 A. 3, 5.

(6) *Garnishee*. No valid seizure is made where a

garnishee accepts service. Petition, citation and interrogatories must be served on him. Phelps, 27 A. 592; Schindler, 18 A. 476; C. P. 246.

(7) An administrator may accept service. Logan, 30 A. 727. As to regular curator (not ad hoc). Byrnes, 115 La. 298.

(8) But where citation is addressed to an agent, or to an officer of a corporation, acceptance of service by such agent or officer does not bring the principal or the corporation into court. White Hall, 127 La. 1022.

(9) Waiver of service is no waiver of legal delays, but the delays begin from the time of acceptance of service, just as from the time of actual service. Nothing is waived or confessed except citation and service of petition. Anheuser-Busch, 49 A. 680; Hecker, 121 La. 467, 46 Sou. 575. The dictum to the contrary in Evans, 30 A. 498, is bad law.

Copy and Citation for Defendant.

Art. 178. The clerk to whom the petition has been delivered, must, except in the case above expressed, make out a faithful and exact copy of the same in the language in which it was presented, in order that it may be served on the defendant, and he must annex to that copy a citation addressed to the defendant, in the form prescribed in the following article.

(1) The copy of the petition should be an exact one. No parts should be omitted, not even the caption or address to the Court. Lukis, 45 A. 1448, 1449.

(2) Service of a copy of the petition with citation is the only way to bring a defendant into court, except where waived (preceding article). Zacherie, 4 La. 154; Slocomb, 18 La. 10; Jacobs, 3 A. 9; White Hall, 127 La.

1026. But defendant may voluntarily appear and answer, and this will take the place of service. See Art. 206 and notes.

(3) The clerk may perform the duties required by this article, although there is no prayer in the petition to that effect; and the proceedings are as effective. Bauduc, 8 N. S. 434.

Requirements of Citation.

Art. 179. The citation addressed to the defendant must be drawn in English; it must mention:

(a) It was formerly required to be drawn also in French when that was the mother-tongue of defendant. It was then held that the exception that it was not drawn in French must be pleaded in limine, and was too late after confirmation of default. Leeds, 4 R. 257; Landry, 7 A. 238. See note (a) to Art. 172.

1. The title of the cause.

(b) Necessary. Caldwell, 6 R. 9. But may be in any part of citation, so long as it precludes mistake. Bank, 10 R. 26.

2. The name of the defendant to whom it is addressed, the place of his residence, or that where he happens to be, in the manner set forth in the petition.

(c) It was held in Lallande, 12 La. 7, that this clause does not require the name and surname of defendant to appear at full length in the citation. But in Baham, 109 La. 1000, 1011, the contrary view seems to be taken; but it is there held that it is a matter which must be excepted to before judgment by default, and defendant cannot afterwards raise the objection.

(d) Statement of the place of residence of defend-

ant necessary. Caldwell, 6 R. 9. But if it is stated in the petition, a copy of which accompanies the citation, that is sufficient. De Marigny, 22 A. 171.

(e) Unless addressed to the defendant, the citation is defective and void. Bertoulin, 19 A. 360. Therefore, although defendant has constituted an agent on whom citation to him may be served, the citation must be addressed to him, and not to the agent. Waddill, 23 A. 773, 778; Jacobs, 28 A. 625; McFaddin, 49 A. 1819, 1320; Leblanc, 21 A. 26; Aldige, 16 A. 180.

And citation addressed to the president of a corporation cannot be the foundation of a valid judgment against the corporation. State vs. Montegudo, 48 A. 1417, 20 Sou. 911; Knoll, 136 La. 241. Citation must be addressed to the company itself. State vs. Voorhies, 50 A. 671. And not to its manager. State vs. Timber Co., 105 La. 379; Bank of Monroe, 124 La. 798, 50 Sou. 718.

Nor will acceptance of service by such officer or agents of a petition making them defendants be effective to bring the corporation or principal into court. White Hall, 127 La. 1022, 54 Sou. 337.

But where plaintiff sues a town, and the clerk addresses the citation to the mayor, which is served on the mayor, while it does not bring the town into court, nevertheless the service on the mayor interrupts prescription. Gueble, 118 La. 494, 43 Sou. 63.

(f) In a suit against an *Ordinary Partnership*, a citation should be addressed to each of the partners. LeBlanc, 25 A. 464. *Commercial Partnership*. See note (2) to Art. 182. *Husband and Wife*. See note (1) to Art. 182.

(g) *Citation to an Absentee* should be addressed to the absentee; but it is immaterial that it is addressed to the curator ad hoc on whom served. Cooper, 2 A. 158; McDonald, 13 A. 405. But, if it is addressed to the cu-

rator, it must be addressed to him in his official capacity, which must be stated in the citation. *Galoche*, 18 A. 481. See note 13 to Art. 116.

(h) *Citation to Representatives*. When one is sued in a representative capacity, the citation should be addressed to him in such capacity. A syndic. *Camutz*, 20 A. 35. A tutor. *Osborn*, 23 A. 178.

3. The name or title of the court before which the defendant is cited to appear.

(i) Not necessary to name the State of Louisiana in the title of the court. *Lalande*, 12 La. 7. But why not do it?

Nor is it necessary to state the name of the Judge. *Hemkin*, 3 R. 155. It is surplusage. *State vs. Head*, 22 A. 55.

But the court must be named. *Gagneaux*, 109 La. 461, 465.

4. It must summon the defendant either to comply with the demand contained in the petition, of which a copy accompanies the citation, or to deliver his answer to the petition in the office of the clerk of the court in which he is cited to appear. The place where such office is held must be expressed.

(j) Citation must be accompanied with a copy of the petition. *Harris*, 1 R. 30.

(k) Must mention place where the office of the clerk of the court is held. *Caldwell*, 6 R. 9. But where it is signed by the clerk, purports to have been issued from a District Court sitting in a particular parish, and calls upon the defendant to file his answer in the clerk's office of that court, at a certain place, it is a sufficient designation of the place where the clerk's office is held. *Medley*, 2 A. 140. And it has been held that where citation to a

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garnishee contains the title of the court, is in the name of the State, and under the seal of the court, attested in the name of the Judge and signed by a deputy clerk, it is a sufficient mention of the place where the clerk's office is held. Landry, 7 A. 238. But it must be noted that this objection was not made in the pleadings in the cited case, and seems to have been urged only in argument. p. 240.

Requiring the defendant to file his answer "in the office of the clerk of the court of the parish aforesaid, at the courthouse" (the name of the parish, etc., having preceded), is a sufficient designation, as the defendant could not be mistaken as to the court before which he was called on to answer. Briggs, 10 R. 119; Standard, 47 A. 715.

We conclude that "at the courthouse of the Parish of St. James" is a sufficient expression of the place where the clerk's office is held.

5. The citation must express the number of days given to the defendant to file his answer, according to the distance from his residence to the place where the court is held, to be reckoned from the day when the citation was served.

C. P., Arts. 180, 318; Cole, 21 A. 613; Dupuy, 21 A. 629.

(1) But citation which does not express number of days for answer will interrupt prescription. Martinez, 30 A. 818. And a judgment which has been virtually acquiesced in cannot be annulled on this ground. Covas, 44 A. 690.

6. It must express the date of the day, month, and year, when it was delivered.

7. It must be signed by the clerk who delivers it, and

express his quality; it must be sealed with the seal of the court by whose order it is given.

(m) Must be signed by the clerk or deputy clerk, and express his quality. Signature by any other officer than the clerk, or by the clerk in any other capacity, is fatal to any proceedings grounded on such citation. *Anderson*, 14 A. 614. Nor will such citation interrupt prescription. *Schwartz*, 109 La. 1081, 34 Sou. 96. Deputy clerk may sign in any case. *Marigny*, 22 A. 172.

And citation signed by a de facto clerk is valid. *New Orleans*, 26 A. 273; *State vs. Sadler*, 51 A. 1397.

But citation signed by the clerk, and which lacks only the seal of the court, will interrupt prescription. *King*, 118 La. 344, 42 Sou. 959.

On appeal, the seal will be presumed, although not copied into the transcript. *Medley*, 2 A. 140.

Delay for Answer.

Art. 180. The delay to be expressed in a citation consists of ten days, to be counted from the time the citation has been served, which are to be allowed to the defendant to comply with the demand of the petitioner if the defendant resides in the place where the court is held, or within ten miles of such place. If the defendant resides at a greater distance, the aforesaid delay shall be increased by one day for every ten miles that his residence is distant from the place of holding court before which he is cited to appear; the delay in no case shall exceed fifteen days in all. In counting the ten days, neither the day when the citation has been served, nor the day when the delay expires are included. (As amended by Act 77 of 1904, p. 190.)

C. P. 175, 5; 818.

(1) If the citation is served on April 9th, the ten days expire on April 19th, and default may be taken on the 20th. Font, 47 A. 273; Pellican, 48 A. 716; Miller, 107 La. 561.

Sundays are to be counted in making up the ten days, a Sunday being necessarily included in every ten days. Johnson, 124 La. 143, 145. But where the last day of the ten is a Sunday, or a dies non, the defendant has the whole of the next day to answer. Catherwood, 30 A. 677.

(2) The provisions of this article do not apply to defendants residing out of the State, or who have no known residence. West, 4 La. 220.

(3) If the defendant live less than ten miles from the courthouse, he is entitled to only ten days delay; if he lives ten or more, but less than twenty miles, he is entitled to eleven days delay; if he lives twenty or more, but less than thirty miles, he is entitled to twelve days delay, etc. Fleming, 11 M. 303. If he lives fifty miles or more, he is entitled to fifteen days. Sullivan, 132 La. 598, 61 Sou. 682.

This distance is computed by ordinary road; not in a straight line, nor by an infrequently used and at times impassable road. Woodward, 15 La. 186.

(4) The clerk cannot always know the distance of defendant's residence from the courthouse. The defendant himself knows the distance. Therefore, it is proper and safe for the citation to express the delay in the words of this article, and leave to the defendant to determine his delay thereunder according to the distance of his residence from the courthouse. Sullivan, 132 La. 600. But the defendant who is allowed in the citation the delay actually applicable to the distance of his residence cannot complain that he is not informed in the citation that the whole delay shall not exceed fifteen days. Sullivan, 132 La. 600. But if a defendant who resides ten miles

or more from the courthouse is cited to answer within ten days, the citation is null. Dupuy, 21 A. 630.

Where Two or More Defendants.

Art. 181. If there are two or more defendants to the suit, the clerk shall make out as many copies of the petition as there are defendants in the cause, whether they all reside in the parish where the court is held, or in different parishes, even if these be out of the jurisdiction of that court.

Citation to Defendants Associated or Having Same Representative.

Art. 182. Nevertheless, if the defendants are husband and wife, or minors, interdicted, or absent persons having the same curator, or persons represented by the same attorney in fact, or partners of the same firm, or members of the same corporation, it will be sufficient to deliver one single citation and one single copy of the petition to the person representing such defendants.

See Act
179
1918
p. 334

(1) Where *Husband and Wife* are sued in the same suit, citation served on the wife brings both into court. Gaines, 6 R. 4; Holt, 33 A. 673. Served on the husband, the same. Gilmore, 9 A. 197. But the citation must be addressed to both in order to make a single citation answer for both. Marrioneaux, 19 A. 208; McElvin, 30 A. 552. This article does not forbid each to be cited separately, and it may be done. Jordan, 29 A. 749. One citation addressed to the wife and "her husband" is sufficient as to both. Phipps, 31 A. 88.

(2) *Partnership.* It is well settled that it is only in the case of a commercial partnership that all of its mem-

bers can be brought into court by a single citation. Stevenson, 23 A. 421; McGehee, 14 La. 362; LeBlanc, 25 A. 464.

Where the partnership is commercial, one citation is sufficient to bring the partnership and all of its members into court upon a partnership matter. Kearney, 14 A. 870. But after the dissolution of a commercial partnership each member must be served with a separate citation, and there can be no judgment against one not cited. Anderson, 27 A. 237. But, even after dissolution, it appears that it is sufficient that the citation be addressed to the firm only, provided it is served on the member sought to be held, and is accompanied by a petition in which judgment is prayed for against each member in solido. Montague, 30 A. 50; Newman, 107 La. 320. See Dunn, 115 La. 1084, 40 Sou. 466.

Clerk Delivers Copies to Sheriff.

See Act
179
1918
p. 334. **Art. 183.** The Clerk must address without delay, the copy of the citation and of the petition intended to be served on the defendant to the sheriff of the parish where that defendant resides.

(1) See Art. 178 and notes as to copies. It is usual for the clerks to make for each defendant to be served two citations, one for service and the other for the Sheriff's return. The citation is made in duplicate; that is to say, both appear to be originals, and the one does not purport to be a copy of the other. We are of opinion that no fault can be found with this practice.

(2) Under this article, the citation with copy of petition must be sent to the Sheriff of the parish where the defendant resides. No Sheriff can serve a citation outside of his parish. Dennison, 131 La. 95, 96, 59 Sou. 26; Thompson, 127 La. 718, 721; Evans, 8 N. S. 247;

Amia, 9 R. 348; *Kendrick's*, 19 La. 37; *Whiting*, 5 A. 687. It is manifest, therefore, that there would be great difficulty in getting service upon a defendant who is temporarily out of the parish of his residence, and leaving no one at his residence on whom citation could be served; as well as on a defendant who has left the parish, but has not acquired a new domicile or residence within the year (Art. 167).

It is to obviate just such a difficulty that Act 76 of 1912, p. 88, was passed, which act provides as follows:

Where Service Made.

"That in any case where suit brought, where the Court has jurisdiction under the laws of Louisiana, and the defendant is domiciled, resides or is temporarily in another parish, service of citation, notice of seizure, notice to appoint appraiser or notice to pay may be made by the sheriff of the parish in which the suit is brought or by the sheriff of the parish where he is domiciled, resides or may be temporarily when such service is made."

This act makes personal service good wherever made within the State, *provided the Court has jurisdiction of the cause*, and provided, of course, that such service is made by a Sheriff or deputy within his own parish.

It must be remembered, however, that a foreigner, or one having no known place of residence in the State, cannot be sued in one jurisdiction and served in another where found. He must be sued in the jurisdiction where found. Art. 165, paragraph five, note (4).

(3) No process can be served outside of the State. *Dumas*, 32 A. 679. Act 23 of 1900, p. 29, unconstitutional, null and void. *Aikmann*, 122 La. 265, 47 Sou. 600.

The Same; Several Defendants.

Art. 184. If, among the defendants, there be some who reside out of the jurisdiction of the court before

which the suit is pending, the clerk must address to the sheriffs of the different parishes where they reside, copies of the citation and petition intended for such defendants, in order that they may be served on them, and such return made of the service as is hereafter provided.

See notes to preceding article.

Sheriff Must Endorse Date of Receipt.

Art. 185. The sheriff to whom the clerk delivers or addresses copies of a petition and citation to be served on a defendant, in the manner above provided, shall indorse upon the same a certificate of the day, month and year, when those documents have been received by or delivered to him.

Sheriff to Serve at Once.

Art. 186. The sheriff must serve those copies, without any delay, on the defendant named in the citation; and when there are several defendants to the same suit, he must make as many services as there are citations; always conforming, in either case, with the provisions hereafter enacted.

C. P. 1026.

(1) *Service by a de Facto Sheriff* is good. His capacity cannot be excepted to collaterally. Gradnigo, 10 A. 670; Turner, 21 A. 543; Cloutier, 33 A. 305, 308; Lehmann, 41 A. 987, 7 Sou. 33; Vinet, 48 A. 1254, 1260; Robertson, 49 A. 80, 21 Sou. 197.

(2) *"Without Any Delay."* But it has been held that the Sheriff exhibits due diligence by serving a citation in time to enable the plaintiff to take a default at the earliest period after the opening of court at the term next

ensuing; and that to render a Sheriff liable for damages resulting from the fact that the citation was not served in time to interrupt prescription; plaintiff must show that the officer was notified of the necessity of earlier service in order to prevent prescription of the claim. Bloomfield, 2 A. 936; Dinkgrave, 26 A. 626.

But, where the Sheriff has been warned of the necessity for prompt action, he will be liable for damages caused by his delay. Sandridge, 2 A. 933. See Anderson, 14 A. 615, as to laches of clerk in issuing citation.

(3) But Sheriff is not bound to proceed unless paid or secured as to his costs, according to law. Adams, 26 A. 626.

Two Modes of Service.

Art. 187. The citation and the petition accompanying it may be served in two different ways, by being delivered to the defendant in person, or by being left at his domicile.

(1) These are the only two modes of accomplishing citation of natural persons. State vs. Stewart, 47 A. 426; Baham, 109 La. 1005. But Sec. 2 of Act 92 of 1873, p. 163, provides an additional mode for service upon non-resident proprietor of plantation in suits by laborers and others for wages, etc., by service upon the overseer or other agent in charge of the plantation. And Act 167 of 1894, p. 206, provides that in suits by vendors or deliverers of sugar cane or syrup for manufacture service may be made upon the agent, overseer or manager of the factory to which the cane or syrup was sold or delivered.

Personal Service.

Art. 188. The service is made in person when the citation and petition are delivered to himself.

Domiciliary Service.

Art. 189. It is made at the domicile when the copies of the citation and petition are left at the usual place of domicile or residence of the defendant, if he be absent, by delivering them to a person, apparently above the age of fourteen, living in the house.

(1) Definition of domicile or residence. R. C. C. 38; see note (2) to Art. 162.

(2) "*If He Be Absent.*" As a matter of course, if he be present, the service will be made on him in person, and the service will not be domiciliary. "Absent" here means absent from home, and it is only in that case that the law dispenses with personal service. Kendrick's, 19 La. 36, 38; Oakey, 4 A. 363; Corcoran, 7 A. 268; Arnault, 21 A. 630; Slatterley, 33 A. 847; Baham, 109 La. 1005; Savant, 136 La. 252.

(3) "*Living in the House.*" It has been several times held, seemingly in the very teeth of this phrase, that service on anyone living on the same plantation with the defendant is valid; that service need not be made on one living in the dwelling-house with defendant, so long as he resided on the same plantation; that the domicile is the plantation, and not the dwelling-house. Maxwell, 6 R. 86; McCalop, 10 A. 224, 225; Rousseau, 24 A. 355.

From these decisions we must respectfully dissent. "Living on the same plantation" does not mean "living in the house." Other authorities hold that the service when defendant is absent from home must be made on one *living in the house in which defendant lives*; and to these authorities we give our full assent, as being in accord with the clear provision of this article. Thibodaux, 3 A. 130; Feazel, 15 A. 462; Baham, 109 La. 1005.

Service cannot be made upon a visitor, or one only

transiently at the house. Lewis, 24 A. 617; Walker, 32, A. 467, 470.

(4) *Must Be Left at the Usual Place of Domicile or Residence.* Service on a person in the street or elsewhere is not good, although that person resides in the same house with the defendant. State vs. Johnson, 12 La. 547; Lancaster, 5 A. 147; Ballard, 14 La. 211; Medley, 5 A. 218; Baham, 109 La. 1005; Flynn, 12 A. 239.

Must be made at the *usual place of domicile or residence*. McCracken, 19 A. 33. At defendant's store not good, unless it is shown that the store and residence were in the same building. Adams, 35 A. 101. "Last place of domicile" is not the equivalent of "usual place," etc. McFadden, 49 A. 1320; Baldwin, 1 N. S. 519; Ireland, 3 N. S. 515.

(5) *Other Requisites* of domiciliary service will be stated and discussed under Art. 201, which, by providing what the Sheriff's return shall state, in effect provides other requirements for valid domiciliary service.

To What Defendants the Two Preceding Articles Apply.

Art. 190. The petition and citation must be served on the defendant in person or left at his domicile, in the manner provided in the two preceding articles, in all cases where the defendant is of age, enjoys civil rights, is present in the place, or has there his acknowledged domicile or residence.

Service on Those Not Included in the Foregoing.

Art. 191. But if the defendant be a minor, a person interdicted, or a married woman, or if the suit be brought against the members of a corporation, of a pub-

lic institution, or of a commercial partnership, the petition and citation must be served in the manner hereafter provided in the following articles.

Service on Married Woman, Not Separated.

Art. 192. If the petition and citation be directed against a married woman not separated from bed and board from her husband, the service may be made by delivering to either the husband or the wife, or by leaving them at the domicile of the latter, by delivering the same to a person apparently above the age of fourteen years, living in their house.

(1) Service on husband interrupts prescription. Bush, 11 A. 503. And brings wife into court. Waddell, 12 A. 14. See note (1) to Art. 182.

Service on Woman Divorced or Separated.

Art. 193. But if the woman be separated from bed and board, or divorced from her husband, the service must be made as if *sole*.

Service on Representatives of Persons Incapacitated or Absent.

Art. 194. If the suit be brought against minors not emancipated, interdicted or absent persons, whose property is administered by a curator, then the petition and citation must be served either by delivery in person to the tutor or curator of such minors, interdicted or absent persons, or by leaving them at the usual place of domicile or residence of such tutor or curator.

Service on Tutor ad Hoc, or Curator ad Hoc.

Art. 195. If the minors, the interdicted or absent persons, against whom the suit is brought, had no tutor or curator, and the plaintiff has had a special tutor or curator appointed to defend them in the suit, the service must be made on that curator in person or at his domicile.

(1) See notes to Art. 116. This article places interdicted persons in same category with unrepresented minors and absentees, who alone are mentioned in Art. 116. Adler, 126 La. 474. See Art. 964, as amended by Act 308 of 1910; Sallier, 108 La. 378.

(2) Tutor ad hoc or curator ad hoc cannot waive service. See note (1) to Art. 177.

(3) Before selling the property of an unrepresented minor or absentee at tax sale the Sheriff should have tutor or curator ad hoc appointed and serve the legal notice on him. Interstate, 118 La. 596.

(4) A curator ad hoc may be appointed to an absentee who has left the State after the institution of the suit, but before service. Zacharie, 4 La. 154; McMicken, 12 La. 155; Loughery, 5 A. 484.

Service on Attorney in Fact of Absentee.

Art. 196. Nevertheless, if the person absent has an attorney in fact, whose name appears in the petition, the sheriff shall serve the same on that attorney in fact, in person or at his domicile.

(1) See note (e) to Art. 179; notes (2) and (3) to Art. 165, Five; note (22), (b), to Art. 116.

(2) Of course, if the party served as attorney in fact is shown not to be such, it defeats the citation. Farmer,

38 A. 232; Aikmann, 122 La. 265, 47 Sou. 600; Collier, 41 A. 37.

(3) Dissolution of a partnership revokes a power of attorney given by it. Conery, 30 A. 692. The agent of the partnership is not the agent of the partners. Johnson, 18 A. 330.

Service on Agent.

(4) This article applies in terms only to a "person absent"; but it is apparent that the same requirements would govern service on the agent of any person present in the State as govern service on the agent of an absentee. If the circumstances are such that service upon the agent is good, it makes no difference whether the defendant be present or absent.

In order to make service upon an agent valid, the agency must be set out in the petition. Pilie, 16 La. 570; Wilson, 12 R. 235. And of course, in order to justify the Court in rendering judgment against a defendant cited through an agent, the agency must be proved. St. Amand, 25 A. 167; Rowland, 10 La. 598; Dawson, 29 A. 363. And it must be such an agency as would authorize the agent to receive service. Weight, 30 A. 1186; Gusman, 33 A. 333; Michie, 20 A. 75; Slatterly, 33 A. 849. In this last case it seems to be held that the agency to receive citation may be proved without allegation in the petition. See LeBlanc, 21 A. 26; Conery, 34 A. 520.

The Sheriff's return that A is agent of B amounts to nothing as proof. First Municipality, 3 A. 453. And the agent's admission of the agency is not sufficient, standing alone. Dawson, 29 A. 363.

Service on Emancipated Minor.

Art. 197. When the suit is brought against an emancipated minor, the sheriff must serve the citation and petition on such minor in person or at his domicile,

unless he is absent from the State, in which case they must be served on the advocate appointed by the judge to defend him.

C. P. 116 and notes; C. C. 57.

Is the advocate here named different from the curator ad hoc provided for in the cited articles? Perhaps it would be safer, when the absentee is an emancipated minor, to appoint an attorney (advocate) as curator ad hoc.

Service on Corporations, Public Institutions, and Partnerships.

Art. 198. When a suit is brought against a corporation, a public institution, or against persons associated in ordinary partnership, the service must be made as follows:

Municipal Corporations.

In suits against the corporation of cities and of other places, on the Mayor in person, or on any other officer exercising similar functions, or in his absence, at the place where he holds his office, by delivery to some of the officers employed there.

Banking Establishments.

In suits against banking establishments, on their president in person, or at the house where the bank is kept, by delivery to the teller, or, in his absence, to some other officer of the establishment.

Other Corporations or Public Institutions.

In suits against other civil or religious corporations or public institutions, on their president in person, or at their office, if they hold such in permanence, by delivery to some of their agents. (To be continued.)

Service on Home Corporations is now, we believe, governed entirely by Sec. 25 of Act 267 of 1914, p. 531, which we print below. The provisions of this Art. 198, printed supra, are, we believe, in so far as they relate to corporations other than municipal, superseded by said act of 1914, Sec. 25 of which reads as follows:

SEC. 25. *Be it further enacted, etc.,* That service of all legal process on any corporation subject to the provisions of this act may be made in the following manner:

(a) On any officer designated in the charter as authorized to receive service, and upon any director of the corporation, or in the cases mentioned in paragraph (d) of this section, or (sic, should be "on") the agent of the corporation in charge of the affairs of the corporation at the place other than its domicile. This service may be made on the officer, director or agent wherever found.

(b) In case the officer, director or agent mentioned in paragraph (a) of this section cannot be found, this service may be made upon any other regularly employed officer, agent, or employee of the corporation over eighteen years of age, found in the domiciliary office of the corporation, or in such other office as the corporation may maintain in the parish other than that of its domicile, where suit may be brought in such parish as provided in paragraph (d) of this section.

(c) In case service cannot be made as provided in

either paragraph (a) or (b) of this section, the officer charged with the duties of making the service shall, after diligent effort, make return to the court, stating the efforts made by him to secure service and the reasons for his failure so to do, and thereafter the Judge, or in the event of his absence from the Parish, the Clerk shall order service to be made on the Secretary of State, whose duty it shall be forthwith, to send by registered mail, addressed to the corporation at its last known domiciliary post office address, the originals of the papers served upon him, retaining in his office true copies thereof, upon which he shall note the date, manner and other particulars of the service and of the disposition of the originals.

(d) Where the corporation is engaged in business in more than one parish, the venue of the suit shall, at the option of the plaintiff, be in the parish where the cause of action arose, or at the domicile of the corporation if the cause of action results from a trespass or offense or quasi offense; but if the cause of action results from any other cause the venue of the action shall be in the parish where is or was located the particular office which had supervision of the transaction from which the cause of action arose or at the domicile of the corporation at the option of the plaintiff.

(1) See Art. 165, Nine, and notes.

(2) Service on a corporation must be made strictly as required by the statute in force. Welch, 128 La. 738, 55 Sou. 338; Prince, 128 La. 834, 55 Sou. 474. These cases were decided under a statute repealed by Act 267 of 1914, Sec. 32, p. 537.

(3) *Form for Return When Service Made as per Paragraph (a):*

“Received the within citation, a duplicate thereof,

and a certified copy of the petition in this cause, to which said duplicate citation was annexed, on the day of, 19..; and on the day of, 19.., I served said duplicate, and said copy of petition, by delivering the same to, the officer designated in the charter of the defendant corporation as authorized to receive service" (or "to, a director of the defendant corporation"; or, where the corporation is not domiciled in the parish, "to, the agent of the defendant corporation in charge of its affairs in this parish"), "which service was made in this parish.

"Parish of Assumption, Aug. 7, 1915.

(Signed) "EDGARD AUCOIN,

"*Sheriff.*"

(Or Deputy Sheriff.)

(4) *Form for Return When Service Made as per Paragraph (b):*

"Received the within citation, a duplicate thereof, and a certified copy of the petition in this cause, to which said duplicate citation was annexed, on the day of, 19..; and on the day of, 19.., after having made careful inquiry and search for the officer (or officers) named in the charter of the defendant corporation as authorized to receive service, and also for a director of the defendant corporation, and not having been able to find any of said persons in this parish, I served said duplicate citation, and said copy of petition, by delivering them to, a regularly employed officer (or agent or employee) of the defendant corporation, over eighteen years of age, whom I found in the domiciliary office of said corporation in this parish, at which office said service was made" (or, where the corporation is not domiciled in the parish, "to,

a regularly employed officer (or agent or employee) of the defendant corporation, whom I found in an office which the defendant corporation maintains in this parish, at which office said service was made").

"Parish of Assumption, Aug. 7th, 1915.

(Signed) "EDGARD AUCOIN,
"Sheriff."

(Or Deputy Sheriff.)

(5) *Form for Return Under Paragraph (c):*

"Received the within citation, a duplicate thereof, and a duly certified copy of the petition in this cause, on the day of, 19..; and this certifies that I made diligent inquiry and search in this parish for the officer (or officers) authorized in the charter of the defendant corporation to receive service, and could not find him (or any of them); that I also made diligent search and inquiry for a director of the defendant corporation, but could find none in this parish; that I made diligent search and inquiry for an office maintained by the defendant corporation in this parish, but could find no such office" (or, instead of the last averment, "that I made diligent search and inquiry at the office maintained by the defendant corporation in this parish for a regularly employed officer, agent or employee of said corporation, over the age of eighteen years, but could find no such person at said office; and that I found, after diligent search and inquiry, no other office of said corporation in this parish").

"Parish of Assumption, Aug. 7th, 1915."

(Signed) etc.

(6) It is suggested that when the order for service on the Secretary of State, under paragraph (c), is made by the clerk, he should certify that the Judge is absent from the parish; or the absence of the Judge should be shown, of record, in some other way.

(7) It will be remembered that when a corporation is properly sued in a parish other than that of its domicile the service does not necessarily have to be made in the parish where the suit is brought. The clerk may send the papers for service to the Sheriff of the parish of the domicile of the corporation, or to the Sheriff of any parish where a legal service could be made. See Arts. 183, 184, and notes.

It is not believed that service upon the Secretary of State would be legal when the corporation has a known domicile, or known officer authorized to receive service, or known directors, in another parish where service could be made.

Service on Foreign Corporations.

(Sec. 26 of Act 267 of 1914, p. 532.)

SEC. 26. *Be it further enacted, etc.,* That service of all legal process on any foreign corporation subject to the provisions of this act shall be made as follows:

(a) On any agent, or agents, which the corporation may have designated, in accordance with existing laws, as agent or agents, for service of process. This service may be made wherever the agent or agents, may be found.

See note 22, (b), to Art. 116.

(b) If the agent, or agents, mentioned in paragraph (a) of this section, cannot be found, then service may be made upon any regularly employed agent or employee of the corporation, over eighteen years old, in any office which the corporation may have established and maintains in this State.

See note 22, (b), (b1), to Art. 116; note 3 to paragraph Five of Art. 165; see notes to Art. 196.

(c) If the corporation, being one required by law to appoint and maintain an agent for service of process, has failed to do so, or such agent, if appointed, cannot be found, and said corporation has not established and maintained an office in the State the officer charged with the duty of making the service, shall, after diligent effort, make return to the court, stating the efforts made by him to secure service, and the reasons for his failure to do so, and thereafter, the Judge, or in the event of his absence from the parish, the clerk, shall order service to be made on the Secretary of State, whose duty it shall be forthwith, to send, by registered mail, addressed to the corporation at its last known domiciliary post office address, the originals of the papers served upon them, retaining in his office true copies thereof, upon which he shall note the date, the manner and other particulars of the service, and of the disposition of the originals.

See note 22, (b), to Art. 116.

(d) (Paragraph (d) of Sec. 26, Act 267, 1914, p. 533, provides the venue of suits against certain foreign corporations. It is printed ante, under Art. 165, No. Nine.)

(e) (Paragraph (e) of same section provides for delivery by the Secretary of State to the clerks of the District Courts and to the Sheriffs of lists giving the names of all foreign corporations which have complied with the provisions of the act (Sec. 23) and have appointed agents for the service of process, with the names and domicile or residence of such agents, etc.)

(f) (Paragraph (f) of same section provides generally the venue of suits against corporations. Printed in the place and stead of subdivision Nine of Art. 165, ante.)

(8) *Forms for Sheriff's Returns in Service on Foreign Corporations.* Follow generally the forms given in

notes (3), (4) and (5), *infra*, changing what should be changed, etc.

Service on Commercial Firms.

(Continuation of Art. 198.) In suits against any commercial association trading under a title or as a firm, on any of the partners in person, or at their store or counting house, by delivery to their clerk or agent.

(9) Before dissolution service on one member is good against the partnership and all of its members, but after dissolution each member must be served. Levy, 106 La. 244; Anderson, 27 A. 237; Wilmot, 32 A. 612; Gaennie, 17 La. 42. Note (2) to Art. 182.

But service on the one member must be in person, and not domiciliary. Abat, 8 N. S. 145, 147. But see O'Hara, 42 A. 226, where this question seems to have been overlooked.

And the citation served on the one member must be addressed to the firm in its social name. Hefferman, 1 A. 146.

In common-law States, each member must be served, and, therefore, our courts will not recognize a judgment rendered in a common-law State against a member who was not cited. Scott, 14 A. 261.

(10) Service at the place of business of the partnership upon the agent or representative there in charge is good. Caldwell, 120 La. 880, 881.

But where the members, and not the partnership, are sued, service upon the clerk at the store is not good. Ridge, 14 A. 866.

(11) This paragraph applies only to commercial partnerships. In all other partnerships each partner must be cited. Note (2) to Art. 182.

And the fact that the partnership is commercial must

be alleged in the petition, and must be proved. Ellery, 18 A. 109.

Service on Captain, Master or Member of Crew of Vessel.

Art. 199. If the suit has been brought against the captain or master of a ship or other vessel, or against some one forming part of the crew of such ship or vessel, having no domicile or residence in the State, the petition and citation must be served either on the defendant in person, or on board of the ship or vessel in which he is employed, by delivery to any person, apparently above the age of fourteen, belonging to the crew of that ship or vessel.

(1) A former owner of a vessel, no longer owner, cannot be served in this way. Gazzam, 3 La. 449. Nor can the present owner, who is neither captain, nor master, nor a member of the crew, be cited in the manner provided by this article, whether he resides within the State. Gazzam, 3 La. 449, 451. Or out of the State. Fellows, 7 A. 451.

But the master, captain or one of the crew can be served, as provided in this article, although he take rooms on shore while the vessel is in port. Erwin, 5 La. 330.

Sheriff's Return.

Art. 200. When the sheriff shall notify the defendant of the suit brought against him, in some of the modes above provided, he must make his return in writing, on the back of the original citation delivered to him, stating in what manner this notification has been effected conformably to the following provisions.

(1) A clerical error in describing the person served does not vitiate the return where sufficient remains to identify the person. Bell, 3 La. 251.

(2) The return cannot be explained, supplemented or completed by parol evidence, not even by that of the officer who made the service. The only remedy is to call upon the officer to amend his return, so as to make it show with certainty how he made the service. Skilliman, 3 N. S. 686; Bank, 10 R. 26. Return the only evidence. Harris, 1 R. 30; LeBlanc, 21 A. 26; Wooldridge, 27 A. 79, 82; Mohr, 39 A. 579, 2 Sou. 540; Hobson, 44 A. 387, 10 Sou. 762; Andrews, 125 La. 222, 51 Sou. 124; Gliddon, 21 A. 682.

Where the return does not show that a legal service has been made, judgment rendered on confirmation of default will be reversed on appeal and the case remanded. If a legal service has actually been made, the return may then be amended to show the facts. Adams, 35 A. 101; O'Hara, 42 A. 226, 7 Sou. 533.

But, of course, where no legal service has been made, amendment of the return would serve no purpose. Le Blanc, 21 A. 26; Mohr, 39 A. 579.

It is no objection to an amended return that it contradicts the original one. Rochelle's, 5 La. 283.

But amendment cannot be made after judgment. Rochelle's, 5 La. 283.

(3) In a *Suit to Annul a Judgment*, on the ground of no legal citation, defendant may prove by parol that a legal citation was actually made, although the Sheriff's return does not show it. Baham, 109 La. 999, 34 Sou. 54.

We have to conclude, therefore, that the rule laid down in the preceding note, and so uniformly held—viz., that the return is the only evidence which can be received as to manner of citation—applies only to the suit in qua, and not to a subsequent suit concerning the subject-matter. This seems reasonable and logical.

And in such a suit the plaintiff may prove by parol that the recitals of the return are untrue. Sloan, 5 A. 218; Marvel, 14 A. 3, 5.

(4) A return cannot be made or amended by any other deputy sheriff than the one who made the service. McKnight, 14 A. 396.

Return of Domiciliary Service.

Art. 201. If the service was made at the domicile of the defendant by delivery to a third person, the sheriff must state in his return:

1. Where the domicile or the house inhabited by the defendant is situated.

2. The name of the person on whom the service was made; whether such person's name was known to him, or whether he learned it by interrogating that person; or in the latter case, if the person refused to tell his name, the return must mention that circumstance.

(1) The Sheriff's return of a domiciliary service must show compliance with all the requirements of Art. 189, as well as the requirements of this article. See note (5) to Art. 189; see Baham, 109 La. 1009.

We will here enumerate these requirements in as logical an order as possible, and give under each one a form for stating such requirement in the Sheriff's return.

Requirements. Sheriff's return of domiciliary service must show:

(a) That it was made at the usual place of domicile or residence of the defendant.

Art. 189, note 4.

Form: "Received on the day of, 19.., the within citation, a duplicate thereof, and a certified copy of the petition in this case, to which said duplicate

RETURN ON CITATION.

citation was annexed; and on the day of, 19..., I served said copy of petition, with said citation annexed, on, the defendant, by leaving the same at the house usually resided in by him."

- (b) Where the domicile or house inhabited by defendant is situated.

No. 1, this article.

Form (continued): "Situated in this parish, on the left side of the public road leading from Napoleonville to Bayou Corne, about seventeen miles from Napoleonville."

- (c) That the defendant was absent from his domicile at the time of service.

Art. 189, note 2.

Form (continued): "He being absent from home at the time."

- (d) Delivery to another named person.

Lehman, 45 A. 352. See (i), below.

Form (continued): "By delivering the same to Miss Effie Marshall."

- (e) That that person was apparently above the age of fourteen years.

Adams, 35 A. 101.

Form (continued): "A person apparently above the age of fourteen years."

- (f) That such person was living in the same house with the defendant.

Note (3) to Art. 189.

Form (continued): "Living in the said house."

- (g) Whether or not such person's name was known to the Sheriff.

O'Hara, 42 A. 227; Lehman, 45 A. 352.

Form (continued): "Whose name was known to me"; or (see next subdivision)

(h) (To be shown only in case such person's name was not known to Sheriff, and he learned it by interrogating him or her.) Whether or not he learned such person's name by interrogating him or her.

O'Hara, 42 A. 227; Lehman, 45 A. 352.

Form (continued): "Whose name, being unknown to me, I learned it by interrogating him (or her)."

(i) (To be shown only in case the Sheriff did not know such person's name, and such person refused to tell it upon interrogation.) That such person refused to tell his (or her) name upon interrogation.

Form (continued): "Whose name, being unknown to me, and he having refused to tell his name upon my interrogating him, *I learned it by careful inquiry of persons of well-known good repute in the vicinity.*"

The italicized portion of this form is entirely our own invention. The Sheriff is required to state the name of the person to whom the papers are delivered. Art. 201, 2; (d), *infra*. We believe it would be safer to ascertain the name in this way, and give it, than to leave it unstated. See note (2), next.

(2) The name of the person to whom the papers are delivered is the only thing which the Code requires to be ascertained by interrogating that person. It is usual to state that "the name and the other facts connected with this service I learned by interrogating said person." We believe this to be unsafe. Citation is such an important matter (Art. 206) that such facts as that the house where

service is made is the defendant's usual place of residence, or that the person to whom the papers are delivered resides in the same house, should not be left to the unsupported, unsworn testimony of a total stranger to the Sheriff. If the Sheriff does not know the defendant, or where he lives, or who are the members of the same household, he should satisfy himself as to these matters, and make sure that he is making the service that the law requires. The Sheriff or deputy usually knows reputable citizens living in defendant's neighborhood. By careful inquiry from these he can satisfy himself, and, having done so, he makes service accordingly. Then, no law requires him to state how he ascertained any of these facts, except the name of the person to whom he delivered the papers. He should confine his statement about interrogating such person to the name alone, and not cast a doubt upon his whole service by making it to rest upon such precarious information. He should not enlarge upon the form above given, which contains all requirements, any more than can be helped.

(3) All the essentials of domiciliary service must be established by the return itself, which cannot be aided by evidence aliunde. Corcoran, 7 A. 268; note (2) to Art. 200.

This, it seems, applies only in the same suit, and not in a subsequent suit to annul the judgment. Note (3) to Art. 200.

Compare notice of tax delinquency. Interstate, 110 La. 286, 34 Sou. 446.

Return on Other Service.

Art. 202. The same formalities which are prescribed in the preceding articles must be observed by the sheriff in serving citations at the office of chartered banks

or other public institutions, or at the counting house of commercial establishments, or on board of ships or vessels.

C. P. 198, 199.

The return must in any case be a brief statement showing compliance with the mode of service required. Forms for service on corporations are given under Art. 198, notes (3), (4) and (5). Returns in other cases may be made by following the forms already given, changing what should be changed.

Further Requirements of Return.

Art. 203. The return of the sheriff must state the day, month and year, when the process was served, and be signed by him.

O'Hara, 42 A. 227. For form, see note (1), (a), to Art. 201.

Sheriff Delivers Original Citation With Return to Clerk.

Art. 204. Immediately after a service of the process, the sheriff must send back to the office of the clerk, from whom he received it, the original citation on which his return has been indorsed, in order that it may be deposited at the office previous to the expiration of the delay given to the defendant to file his answer.

(1) The return should be placed in the record of the suit, where it becomes a part of such record. Miguez, 109 La. 1093.

As to its value and necessity to prove service, see notes (2) and (3) to Art. 200; note (3) to Art. 201.

After twenty years from its rendition, a judgment will not be annulled because no citation or return appears of record. It will be presumed that the return was lost from the record in the long interim. Gentile, 3 A. 146; Gibson, 2 A. 503. But such presumption does not apply within twenty years. Miguez, 109 La. 1093. However, it will be found that much will depend upon the circumstances of each case, the manner in which the records have been kept, etc. Same cases.

Sheriff Liable for Damage Caused by Neglect in Service or Return.

Art. 205. If the sheriff who has charge of a citation and petition, neglect or postpone serving them regularly, or delay, without good cause, to deliver or send back the original citation, with his return indorsed, to the office whence it issued, he shall be liable for all the loss and damage which the party may have sustained through his neglect.

See notes (2) and (3) to Art. 186.

No Valid Judgment Without Legal Citation or Voluntary Appearance.

Art. 206. Citation being the essential ground of all civil actions in ordinary proceeding, the neglect of that formality annuls radically all proceedings had, unless the defendant have voluntarily appeared to the suit and answered the demand.

But citation is not necessary in executory proceedings, nor when the proceedings are *in rem* against the thing as hereafter provided.

C. P. 606, Nos. 2 and 4.

Proceedings in rem. C. P. 290 et seq. Executory proceedings. C. P. 732 et seq.

(1) *Want of a Valid Citation* carries with it, ipso facto, the nullity of the judgment rendered, unless citation has been waived or a voluntary appearance made by the defendant. Gates, 116 La. 548; Baham, 109 La. 1005; Conery, 30 A. 692; McCan, 17 A. 91; Bledsoe, 33 A. 618; Michie, 20 A. 75; Cole, 21 A. 613; Arnault, 21 A. 630; Woolfork, 30 A. 140; Laurant, 30 A. 363; Jacobs, 28 La. 625; Jacobs, 134 La. 389, 64 Sou. 150.

(2) *In Attachment Suits.* And citation, or the formalities prescribed in lieu thereof, essential in attachment suits. Putnam, 3 R. 232; Kraeutler, 12 R. 461; Mithoff, 9 A. 550. And return must show these formalities under penalty of nullity. Connell, 24 A. 512; Wooldridge, 27 A. 82; Lehman, 45 A. 346, 12 Sou. 504; Elder, 50 A. 1080, 23 Sou. 929.

(3) *Knowledge* that the action is proceeding, however clearly brought home to defendant, cannot supply the place of citation. Caldwell, 6 R. 9; Bertoulin, 19 A. 360; Guidry, 25 A. 636; White Hall, 127 La. 1026.

(4) *Disposition of Cause in Same Suit Where Service Defective.* Want of citation or defective citation will not dismiss the suit, but the Court will continue the cause in order that plaintiff may have new and proper service made; and the Supreme Court will remand the case for that purpose. Therefore:

Where the clerk failed to deliver to the Sheriff a true copy of the petition, case remanded to have correct copy with citation served. Lukis, 45 A. 1450.

And, where the clerk failed to issue a citation correctly drawn and addressed, case remanded for service of new citation and petition. Aldige, 16 A. 180; State vs. Montegudo, 48 A. 1418; State vs. Voorhies, 50 A. 674; State vs. Timber Co., 105 La. 382.

And where the papers were correctly drawn by the clerk, but the service was not made according to law, case remanded for new service. *Michie*, 20 A. 75; *Jones*, 23 A. 304.

And where papers were correct in form, and service properly made, but return defective, the return may be amended before judgment in lower court. If not, the Supreme Court remands for correct service or amendment of return, as the case may be. *Adams*, 35 A. 101; note (2) to Art. 200.

(5) *Effect, After Final Judgment, of Want of Legal Citation.* A judgment rendered without legal citation or the appearance of the party sued, is a nullity so absolute that it can be shown whenever and wherever the judgment is sought to be enforced, even in a different jurisdiction from that which rendered the judgment. *Waddill*, 23 A. 777, and cases there cited; *Walworth*, 24 A. 251; *Decuir*, 105 La. 485, and cases cited.

It may be attacked collaterally in any form of proceeding. *Conery*, 30 A. 692; *Jacobs*, 134 La. 390, 64 Sou. 150.

Such a judgment cannot be revived, and its nullity may be shown in defense to suit to revive. *Conery*, 30 A. 692; *Laurant*, 30 A. 363; *King*, 32 A. 1006; *Conery*, 34 A. 523; *Administrators*, 37 A. 916. Burden to show nullity on defendant. *Levy*, 34 A. 413.

And it is only by acts of great weight and conclusively proved that a party would be estopped to urge the nullity of such a judgment. Placing it on his schedule in bankruptcy does not estop him. *King*, 32 A. 1006.

And where the land is sold under such a judgment, suit brought to recover the land is a petitory action, rather than a suit to annul the judgment (which is only incidental); therefore, such suit may be brought in any court having jurisdiction, and not necessarily in the court which rendered the void judgment. *Bledsoe*, 33 A. 615; *Jacobs*, 134 La. 390, 64 Sou. 150.

In a suit to annul a judgment for want of legal citation evidence not confined to the Sheriff's return. Note (3) to Art. 200.

(6) *In Garnishment Proceedings.* No judgment can be rendered against a garnishee without citing him. Delacroix, 24 A. 141; Bank of Monroe, 124 La. 798, 50 Sou. 718.

(7) *Relief by Certiorari* lies where there is no appeal and the lower Court has overruled an exception to the citation which it should have sustained. State vs. Voories, 50 A. 671; Welch, 128 La. 739, 55 Sou. 338.

(8) *Where Defendant Voluntarily Appears and Answers the Demand*, it cures the want of citation. La Societe, 24 A. 347; Dubuys, 4 N. S. 286.

The words "voluntarily appeared to the suit and answered the demand" seem to have been very much broadened by the jurisprudence. They seem to have been interpreted as if the disjunctive "or" had been used instead of the conjunctive "and." It is usually laid down that an appearance for any other purpose than to plead the want of citation amounts to a waiver of citation. Andrews, 125 La. 217, 222; Byland, 38 A. 756; White Hall, 127 La. 1028; New Orleans, 23 A. 803; New Orleans, 21 A. 439; Bush, 24 A. 272; Collins, 5 La. 256; Williams, 45 A. 1013, 1016; Hollingsworth, 46 A. 515, 520; Nicholson, 27 A. 432; Union, 113 La. 447. The earliest case to hold this, and which has been followed, either directly or indirectly, in all the cases here cited, is Dyson, 9 M. 493. The decision in this case was based upon authorities from other jurisdictions, rather than upon an interpretation of this article. However that may be, the rule seems to have become rock-bedded in our jurisprudence; so much so that we make no attempt to enumerate the different pleas, exceptions and motions, such as to the jurisdiction, lis pendens, motion to bond sequestration, etc., which have been

held in one or another of the cited cases to amount to an appearance, and cure the want of citation.

The rule is so general that we will rather note some of the exceptions thereto which we have been able to find, as follows:

Appearances Which Do Not Cure Want of Legal Citation.

(a) To move for security for costs. Collier, 41 A. 37, 5 Sou. 537.

(b) To move to set aside writ of arrest. Jacobs, 3 A. 9.

(c) To plead a misnomer. Slocomb, 13 La. 10, 11.

(d) To take an appeal. Marin, 29 A. 362.

(e) And, of course, to plead the want of legal citation, or call the attention of the Court thereto. The manner of doing this, and preserving defendants' rights under it, is so important that we make it the subject of the next note.

(9) *Pleading Want of Legal Citation.* This plea or exception must be made alone, and unconnected with any other issue or plea, except one that does not amount to an appearance. See exceptions noted in note (8), ante. A matter of defense urged at the same time destroys the plea. Heard, 27 A. 542; Gomila, 41 A. 116, 5 Sou. 548. So does the appearance or filing other matter of defense afterwards, without reservation of the plea as to citation. Penny, 11 A. 197; Livingston, 1 A. 323; Rowlett, 4 La. 86, 91.

But another plea may be filed simultaneously with that to the citation, without destroying the latter, if it is pleaded in the alternative. Lukis, 45 A. 1449, 1450.

And another plea may be filed after the plea to the citation is overruled, without losing the benefit thereof, provided such other plea is filed with reservation of all

rights under the first plea. *State vs. Dupre*, 46 A. 117, 14 Sou. 907.

Compare this subject with the very closely related subject of submitting to the jurisdiction of a court by making appearance in a suit filed therein. Art. 93 and notes. The decisions quoted there would be helpful here, and vice versa.

(10) The appearance can have *No Retroactive Effect*. Therefore, prescription is not interrupted until the date of the appearance. *Prater*, 118 La. 628, 639. And appearance cannot give life to a writ of attachment or of sequestration previously excepted to as null for want of legal citation. *Elder*, 50 A. 1077, 1085.

(11) *Acknowledged Appearance*. Where defendant files a paper in which he declares that he makes appearance to the suit, it is an appearance for every purpose. *Mutual Bank*, 50 A. 1332.

(12) *Estoppel to Deny Legal Citation*. Where defendant had pleaded *lis pendens* in another court, alleging that a suit for the same thing was pending against him in the first court, and had obtained the benefit of such plea, he cannot afterwards plead want of legal citation in the suit in the first court. *Abbott*, 22 A. 368.

(13) *Citation Unnecessary*:

(a) Where judgment has been previously legally confessed. *Marbury*, 29 A. 557; note (3) to Art. 177.

(b) Where judgment is consented to in open court. *Thornhill*, 34 A. 1171, 1175.

(c) Where citation is waived or acknowledged. Art. 177.

(d) Summary proceedings are usually conducted by rule. A copy of the rule with the order to show cause is usually served on the defendant without citation. See *State vs. Judge*, 34 A. 78.

(e) Citation by advertisement permitted in cer-

tain cases in tax matters, in successions, insolvencies, and the like. *State vs. Judge*, 34 A. 78.

(f) Oppositions to administrators' accounts and the like are in the nature of answers, and no citation required. *Anderson*, 32 A. 892; *Majewski*, 40 A. 94.

Ex Parte Judgments. Some judgments are permitted to be rendered *ex parte*; for example, a judgment recognizing heirs, and placing them in possession, where there are no known adverse claimants. The principal use of such a judgment is to furnish record evidence of the transfer of title from the deceased to his heirs. Such a judgment amounts to only *prima facie* proof in a suit concerning title, and is not binding on anyone who was not made a party to the proceeding in which the judgment was rendered. *Dalton*, 35 A. 355; *Lorenz*, 41 A. 1093. fa

Other judgments rendered *ex parte* fall under the principle declared in this article, and are null. Thus: Judgment appointing receiver. *Ober*, 44 A. 570. Judgment recognizing surviving spouse as heir. *Allen*, 44 A. 801. See *Roberts*, 35 A. 454; *Morris*, 34 A. 657; *Bank*, 21 A. 380.

Holidays, No Proceedings Allowed on.

Art. 207. No citation can issue, no demand can be made, no proceedings had, nor suits instituted on Sundays, on the Fourth of July, on the First and Eighth of January, on the Twenty-fifth of December, Twenty-second of February, on Good Friday, and moreover in the Parish of Orleans on Mardi Gras and the Fourth of March, nor shall any arrest be made after sunset on any individual within his domicile, provided, however, that writs of arrest, of attachment, of sequestration, of provisional seizure, and injunction may issue and be executed on, Sundays and legal holidays.

(1) *Excerpts, relating to Judicial Proceedings, from Sec. 1114, R. S., as amended by Act 93 of 1912, p. 100.*

"The following shall be considered as days of public rest and legal holidays and half-holidays in this State, and no others, namely;

"Sundays, the first of January, the eighth of January, the twenty-second of February, Good Friday, June the third, to be known as Confederate Memorial Day, the fourth of July, the first Monday of September, to be known as Labor Day, the first of November, Thanksgiving Day, as designated by the President of the United States, the twenty-fifth of December, and all general election days, whether Presidential, Congressional, State, municipal or parochial, in the localities where said elections are held; and in the Parish of Orleans, Mardi Gras, and also in cities and towns where the population shall exceed ten thousand, every Saturday from twelve o'clock noon until twelve o'clock midnight, to be known as a half holiday; and in all cities and towns whose population shall exceed ten thousand, whenever the first of January, the eighth of January, the twenty-second of February, June the third, the fourth of July, the first of November, the twenty-fifth of December shall fall on a Sunday, the succeeding day shall be a legal holiday. * * *

(Portion omitted relates to commercial paper).

*Am.
Act 167
1918
p. 319.*

"Provided further, that it shall be lawful to file and record suits, deeds, mortgages and liens and to issue and serve citation and to take and execute all other legal proceedings and to make sheriff's sales on Saturday half holidays."

(2) *Legal Holidays in Jefferson, St. Charles and St. John the Baptist Parishes.*

Act 252 of 1912, p. 558, being a special act fixing the legal holidays in the above named parishes, controls as to those parishes. Its provisions are the same as those of Sec. 1114, R. S. (*supra*), except in the following respects:

(a) Mardi Gras is a legal holiday in those parishes as in the Parish of Orleans.

(b) Saturdays, from twelve o'clock noon to twelve o'clock midnight, are half holidays in those parishes, as in cities of over ten thousand.

(c) When the 1st of January, the 8th of January, the 22nd of February, June 3rd, the Fourth of July, the 1st of November or the 25th of December fall upon a Sunday, the succeeding day is a holiday in those parishes, as in cities of over ten thousand.

(3) *Completion of Trials on Legal Holidays.*

Act No. 6, 1904, p. 9.

"That whenever empaneling of a jury or the taking of evidence on the trial of any case shall have been begun, but not concluded, at the time at which there shall intervene any legal holiday or legal half holiday, it shall be lawful for the presiding judge, and within his discretion, to order said trial to be proceeded with upon said legal holiday, if not a Sunday or Christmas day, or upon said legal half holiday, and all proceedings thereafter had in the trial of said case shall have the same force and effect as though had on a day not a legal holiday or legal half holiday."

(4) It will be noticed that Sec. 1114, R. S., makes some days legal holidays which are not mentioned in Art. 207. While this article has never been amended so as to name all the legal holidays, it is clear that it should be

read as if it included them all. This follows from the very meaning of the term "legal holiday." Moreover, the proviso at the end of Sec. 1114, permitting legal proceedings on Saturday half holidays, is an affirmative pregnant with the negative that such proceedings are not permitted on other legal holidays.

Such is the construction of the Supreme Court. *Rady*, 126 La. 275. Service of citation made on a legal holiday will not interrupt prescription. *Rady*, 126 La. 273, 52 Sou. 491. The service in this case was made on a Saturday half holiday, before the proviso had been inserted in Sec. 1114 permitting service on such half holiday.

In *Foy*, 3 A. 275, a sequestration was set aside because the writ had been served on a Sunday. This was before this article was amended to permit the execution of such writs on dies non.

(5) *Acts Purely Ministerial or Purely Voluntary.* It is believed that there are many acts of a purely ministerial nature, in the course of a judicial proceeding, which may be done on a legal holiday if the act is purely voluntary on the part of those immediately concerned.

Thus, the clerk may refuse to receive and file an appeal bond on a legal holiday; but if he does voluntarily receive and file it within the legal delay, and it is found in the record of the suit, it can be no objection to its validity in perfecting the appeal that it was received and filed on a legal holiday. A case deciding this is not reported, but the Supreme Court refused a writ therein.

And the verdict of a jury may be received and ordered recorded on a dies non. *State vs. Atkinson*, 104 La. 570; *State vs. Ford*, 37 A. 466; *State vs. Canty*, 41 A. 587; *State vs. Vernado*, 126 La. 734, 742. All of these cases except the last were decided prior to Act 6 of 1904, *supra*.

See, generally, on this subject, *Haven vs. Stiles*, 1 A. & E. Ann. Cases, 277, and note, p. 279; 10 L. R. A. (N. S.) 793.

[END OF VOL. I.]

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